

I do allow the Re-printing
the *Parson's Counsellor*, as
it is now Corrected and
Enlarged.

Jan. 2.
1676.

Fra. North.

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Law *Deacons*

THE
Parson's Counsellor,
WITH THE
LAW
OF
TYTHES or TYTHING:
In Two Books.

The first sheweth the Order every Parson, Vicar, &c. ought to observe in obtaining a *Spiritual Preferment*, and what *Duties* are incumbent upon him after the taking the same, and many other things necessary for every CLERGY-MAN to know and observe.

The second shews, in what manner all Sorts of *Tythes*, *Offerings*, *Mortuaries*, and other *Church-Duties* are to be paid, as well in LONDON as elsewhere, and as well by the *Canon* as *Common* and *Statute-Laws*, and in what Courts and Manner they may be recovered, what *Charges* they are subject to, and many other things concerning the same; necessary for CLERGY-MEN, and *All others* to know.

The Sixth Edition Corrected, and much enlarged in many particulars through the whole Book, with a Table, &c.

Written by Sir SIMON DEGGE, Kt.

L O N D O N,
Printed by the Assigns of Richard and Edward Atkins, Esqs;
for Richard Ware at Grays-Inn-Gate. 1703.

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TO THE
RIGHT HONOURABLE
AND
RIGHT REVEREND
Father in GOD,
THOMAS,

Lord Bishop of
Lichfield and Coventry.

My Lord,

I Thought to have sent
this Trifle into the
World without Patron
or Author's Name to it;
but 'tis well known, how scan-
dalous it is to that Child whose
A 3 Parent

The Epistle

Parent is ashamed to own it;
I therefore resolved to run
the Censure of a Critical
World: And then observing
how ancient Dedications have
been both by Greek and La-
tin Authors, and that they
are continued to this Day
throughout all Christendom, I
resolved not to be singular:
And considering that this lit-
tle Undertaking was perfor-
med at the Request of some Re-
verend Clergy-men of Your
Lordship's Diocess, and that it
was Nursed up to what it is
now presented to Your Lord-
ship there likewise, I concei-
ved it could not challenge the
Patronage of any other more
properly,

Dedicatory.

properly, than of Your Lordship ; and therefore such as it is, I here humbly present it to Your Lordship. My Lord, At first I designed no more, but the Second Part of what it now is ; but observing Your Lordship's diligent and great Care at Your Lordship's Primary Visitation at Derby against Simony, Diliapidations and Nonresidence, the Three great Pests in the Church, I added Three Chapters upon those Subjects ; and after adding one thing after another, it came to make a distinct Part of this Work alone. My Lord, Your Lordship has had many Honourable

The Epistle

ble and worthy Predecessors,
and I cannot forbear to men-
tion to Your Lordship your
immediate Predecessor, my
Lord Bishop Hacket, with
what indefatigable Industry
did he repair, or rather Re-
edify the Church at Lich-
field, which he happily lived
to finish? A Work could
hardly have been performed
by any other. How circum-
spectly, prudently and dili-
gently did he govern his
Church, never absenting him-
self, unless in His Majesty's
and Countries Service? How
constantly did he visit and
preach throuhh his Diecess?
A Religious Pattern for all
his

Dedicatory.

his Clergy. What great Insight had he both in the Civil, Canon and Common Laws, that related to the Church-Government? How oft did he sit in his Consistory to see Justice done? Nay, what did he neglect, that became a worthy Prelate to do? And for his deep and profound Learning in his Function, certainly few exceeded Him, if I have any Judgment. My Lord, I have observed Three things perpetuate Mens Memory to Posterity, Children, Learned Writings, and Publick and Eminent Buildings, he was fortunate in them all; He
has

The Epistle

*has left a Worthy Son to In-
herit his Name, Vertue and
Temporal Estate ; He has
left many Learned Works
for the benefit of Posterity,
whereof some are already
made Publick ; and he has
made himself no less Eminent
by his Publick Buildings,
witness his Cathedral Church
at Lichfield, and Trinity-
College in Cambridge ,
where he had his Education ;
besides many other Works of
Piety and Charity in those few
years he was Bishop. My
Lord, God hath not yet blest
you with Children, but may
in good time, to preserve Your
Name : And I have heard
Your*

Dedicatory.

Your Lordship intends some Eminent Works for the Publick; and that Your Lordship hath resolved to go on, where your Predecessor left, in Building a Palace for your self and Successors; I have great reason to believe, having heard your Lordship so often declare you would do it; and having laid your Hand to the Plough in preparing some Materials towards it, I know you will not look back: I have heard your Lordship declare how much you delight in Hospitality, which can never be so splendid as in a Palace of Tit. 1. 8. your own Building: And hereby your Lordship will make
Your

The Epistle, &c.

*Your self as Eminent in the
next Age, as Your worthy Pre-
decessor is in the present, than
which nothing can be greater
satisfaction to all, but chiefly
to,*

My Honoured good Lord,

Your Lordship's most dutiful Son,

and most obedient Servant,

S. DEGGE.

TO

**To the Parsons, Vicars, and
the rest of the Reverend
Clergy of the Church
of England.**

YOUR kind Acceptance of the former Impressions of this Book, has encouraged me this Sixth time to appear in Publick. The first was hurried to the Press so hastily, that I had not time seriously to peruse it, whereby some things were slipt in the Copy; and my being far from the Press, occasioned many Mistakes by the Printer. In this, and the latter, something more Care has been taken. The only essential Oversight in the first Impression (which I have yet discovered) was in the Sixth Chapter of the First Book, which I
must

must still desire may be corrected by this. I added many things to the Second, Third and Fourth Editions, with Three whole Chapters ; and many things to this. Your continued kind Acceptance makes me think my Labour well bestowed.

Et sic Valet.

S. D.

T O

TO THE
Courteous Reader.

IT is observed in the Second Part of Sir *Edward Coke's Reports*, in the Bishop of *Winchester's Case*, that there were two great Persecutions of the Christian Religion, the one under *Dioclesian*, the other under *Julian the Apostate*: The first by murdering the Priests, that by their Preaching advanced the Christian Religion: The latter, by spoiling the Church of its Revenues. The former contrary to expectation advanced, and not suppressed Religion: For it has proved in all Ages, that *Sanguis Martyrum est semen Ecclesiae*, for the patient suffering of so many Martyrs of the Primitive Christians. gave the World

To the Reader.

a sufficient Testimony, that those poor Christians had some extraordinary Divine Assistance to undergo with Patience so much Cruelty, that no others durst put themselves unto the trial of. But the taking away the Revenues of the Church, Martyred the Priesthood it self, and struct at the Foundation: For when People saw there was nothing left but Persecutions, no Sustenance for those that Ministred at the Altar, it discouraged them to breed their Children up to a Study that advanced them to nothing but Danger; which introduced great ignorance of the true Knowledge of God and Religion: So that as one killed the Priests, the other destroyed the very Priesthood it self. And though

Pro-

2. Cor. 11. 9.

the Apostle St. Paul got his Living by his Labour, that he might not become burthensom to his

To the Reader.

Profelytes, yet the same Apostle tells us, that *the Labourer is worthy* ^{2 Cor. 11. 12, 14, 16.} of his hire; and that by the Law ^{Matth. 10. 10.} of Moses, *The Ox was not to be muzzled that treads forth the Corn*: ^{1 Tim. 5. 18.} And by way of Expostulation in another place; says, *Who goes on warfare at his own Charge? Who* ^{2 Cor. 9. 7. 9, 10.} plants a Vineyard, and eats not of the Fruit thereof? And who feeds a Flock, and eats not of the Milk thereof? For he that ploweth should plow in hope, and he that thresheth should be partaker of his hope. And again, says he, Is it a great thing, that those that sow to you spiritual things, should reap carnal? And do you not know (says the same Apostle) that they that Minister about holy things, live of the things of the Temple? And that they that wait at the Altar, are partakers with the Altar? For so hath the Lord ordained, That they that preach the Gospel, should live of the Gos-
a pel.

To the Reader.

pel. What effect this Doctrine wrought amongst the Primitive Christians, you may read in the fourth Chapter of the *Acts of the Apostles*, where it is said, That as many as were Possessors of Houses or Lands sold them, and brought the prices of things that were sold, and laid them down at the Apostles feet; and distribution was made to every man according as he had need. But the Christians of this present Age are so far from selling their Houses and Lands, and laying the price at the Apostles feet, that they will rather detain that from the Clergy, which by Law and Right is due to them. But certainly, had the sincerity of the Primitive Christians continued, I should never have needed to have set Pen to Paper upon this Subject I am now about, which is the *Law of Tythes* or *Tything*: A Duty established by the Laws
of

To the Reader.

of this, as of other Nations, for the maintenance of the Secular Clergy, and for their sake it is that I have undertaken this Work. There was a Tything Table published many years ago by a Bachelor of Laws, wherein he has Learnedly set forth the manner of Tything by the Canon and Ecclesiastical Laws: But those Laws and the Common Laws of this Realm differing in many things, wherein the Common Law is to be preferred; that Tything Table has often led both Parson and Parishioners into many Errors: Besides the several Discharges from Payment of Tythes, either absolutely, or *sub modo*, of divers Lands in *England*, by the Statutes or Common Laws, makes great alterations here from the Canon Laws. To rectify which and (as near as may be) to reconcile the *Canon* and *Common Laws*,

To the Reader.

I did by the persuation of some Reverend Divines, first make some Animadversions upon that Tything Table: But when I had done that, considering there were many more things in relation to Tything, that I could not conveniently apply to the Text, concerning *Prescriptions, Customs, Compositions*, and other Privileges, besides the Laws concerning *Offerings, Mortuaries*, and other Church Duties, fit for all Men to know, as well Lay as Clergy, I adventured upon this larger Work. Which I the rather did, because I do not find any other that hath Published any compleat Work in this kind, or to reconcile the Common and Canons Laws, that kind of Learning lying dispersed in our Law Books; I had therefore in favour of the Parsons and Vicars, taken up a former Resolution, and adventured

to

To the Reader.

to expose my self to the publick
Censure. And though I cannot
promise any perfection in this
Work, yet I dare presume to say,
it is the most perfect Work of
this nature yet extant; though I
can pretend to nothing of it
without the Errors and Mistakes,
which I will be thankful to any
body that will friendly correct,
that I may make it more exact in
a future Edition, if I have encou-
agement. The hinderance of
conversing with the Learned, by
reason of my Retirement to the
Country, and not having ac-
cess to any publick Libraries,
 hath hindered me of some helps I
 might have had thereby. Perhaps
it may not be so acceptable to
those in whose Favour I have writ
it, because it comes from the Pen
of one who professes himself a
common Lawyer: But in my
judgment, in this Nation, wherein

To the Reader.

Selden.
Præf. ad
Hist. de
Dec. 20.

the Common Laws and Customs of the Country prevail against the Canon and Ecclesiastical Law ; this Subject is not altogether improper , if not most proper for a common Lawyer. And truly I have through this Discourse dealt with as impartial a hand as the Matter would admit. And though the Clergy may think it to their prejudice, that I have at large set forth the several Discharges by which Lands are free'd from the Payment of Tythes : Yet in that I have given a clear Light, which Lands cannot be so privileged , and what Prescriptions and *Modus decimandi* are not good, being well assured that there are more Lands at this day escape Payment of Tythes upon pretence of some Privilege, to which they have no right, than those that pay Tythes, and might legally be discharged.

But

To the Reader.

But when I have done my best endeavour to serve the Reverend Clergy, I cannot give them Encouragement to depend upon their own Judgments, grounded upon any thing here writ; for though this may suffice to give them some light, what shall be due to them, yet I cannot hope by any thing I can write to make them Lawyers; for many *Quære's* will arise, that no foresight of mine could give an Answer to: But this Benefit I hope they will receive by my Labours, that they may put their case, and make their doubts known more pertinently to the Learned. I had no sooner finished this little Tract concerning Tythes, but I considered that there were many other things almost as useful for a Clergy-man to know, as the Law of Tythes: And though Mr. *Hughes* of *Grays-Inn* many years since,

a 4

To the Reader.

since published a learned Tract, which he Intituled, *The Parsons Law*; yet there are many more things necessary for a Clergyman to know, that are there only briefly, or not at all touched upon; and of such force, that they must either be performed and observed to make a Man a compleat Parson, or to make him none, though never so exactly instituted and inducted, if omitted. I have therefore in the first place, before I come to the Law of Tythes, shewed, what Simony is, and what danger those run themselves into, that are guilty of it; what things every Parson, Vicar, &c. is to do before, at, and after his Institution and Induction, to make him a compleat Parson, &c. what Dilapidations are, and how punishable; what Privileges the Clergy have at this day by the Laws of *England*; what

To the Reader.

what Charge and Payments their Tythe and Church-Livings are subject unto ; what Causes of Deprivation have been allowed of by the Laws of *England* ; what Leases they may take or set, and what Statutes they may fall in danger of ; and of Pluralities, and who is qualified to have them, and in what manner to be accepted ; Non-residence , and many other things necessary for every Clergyman to know. I have divided the whole into Two Books, and them again into several Chapters and Paragraphs , and added a short Table for the more ready finding of any thing in either. I have likewise added a List or Catalogue of all the Abbies and Priories that were valued in the Kings Books at 200 *l. per Annum*, or upwards, and which were dissolved by the Statute of 31 *H. 8.* the Lands of which can only pretend

To the Reader.

pretend to any Privilege to be discharged of the payment of Tythes; in which I have rather chosen to write after Mr. *Dugdale*, being a surer Author than Mr. *Speed*, in whom I have observed many Mistakes. I must beg the Reader's Patience to correct the Mistakes of the *Printer*, (which are too many, by reason of my absence from the Press:) And for my own, I shall take it kindly from any body, that will in a Friendly manner inform me of them ; for *Humanum est errare* ; and though I may have cause to be ashamed of them, yet I will never be ashamed to amend.

Vale.

The

The Contents of the several Chapters contained in the First Part of this Book, intituled, *The Parson's Counsellor.*

CHap. 1. *Who may, or may not be a Parson, Who may be a Vicar, &c.* Page 1. Parson.

Chap. 2. *How one that is a person fitly qualified to be a Parson, Vicar, &c. ought to proceed in obtaining and accepting of a Benefice.* How he must proceed in taking a Living.

P. 5.

Chap. 3. *In what cases it is necessary for the Bishop to have a Jure Patronatus, and how to proceed in the same, and what is the force and effect thereof.* Jure Patronatus.

P. 11.

Chap. 4. *How the Law stood concerning Pluralities before the Statute of 21 H.8. who are qualified within that Law to have Pluralities, and how they ought to behave themselves in taking second Livings, so that the first may not be made void.* Pluralities.

P. 20.

Chap. 5. *What Simony is, and who shall be said to be guilty of it, and what are the dangers ensuing thereupon.* Simony.

P. 39.

Chap. 6. *What one is to do before, and at Institution, and after Induction, to make himself a compleat Parson.* What he is to do, at, before, and after Institution and Induction.

P. 67.

Chap. 7. *What is required further of Parsons, &c. after Induction, and what Non-residence is, and the dangers incurred thereby, and what matters will excuse the same.* Non-residence.

P. 73.

Char

The Contents.

Dilapidations.	Chap. 8. <i>What shall be said to be Dilapidations, and how the same are remedied and punished.</i> p.89.
Deprivation.	Chap. 9. <i>For what cause a Parson, Vicar, &c. may be deprived, according to the Rules of the Common Laws.</i> p.97.
Leases.	Chap. 10. <i>What Leases a Parson, Vicar, &c. may make of his Glebe and Tythes, and what Farms he may, or may not take, and within the danger of what other Statutes they may fall.</i> p.103.
Farms.	
Privileges of the Clergy.	Chap. 11. <i>What Privileges are allowed to the Clergy by the Statute and Common Laws of this Realm, and what are pretended to by the Ecclesiastical Laws.</i> p.145.
Churches.	Chap. 12. <i>How the Law stands concerning Churches, Chappels, and Church-yards, in whom the Freehold is, and how the Churches and Chappels are to be repaired, and concerning the Seats, Burials, Tombs, Coat of Arms, and other Ensigns of Honour, in memory of the Dead; and of the Church-Ornaments, and at whose charge to be provided; and what remedy for Trespases in the Church, Church-yard, or in breaking up of Tombs, taking, carrying away or imbezelling any of the Goods, or Ornaments of the Church, &c.</i> p.160.
Chappels.	
Church-yards.	
Seats.	
Burials.	
Tombs.	
Parsonages.	Chap. 13. <i>Of Parsonages, Vicarages, Sine Cura's, and Donatives, and of the Endowments of Vicarages, and how, and in what Cases a Parsonage and the Vicarage are to be reunited, and many other things relating to Parsonages, Vicarages, Donatives, and Sine Cura's.</i> p.190.
Vicarages.	
Sine Cura.	
Donative.	
Resignation.	Chap. 14. <i>What Resignations and Permutations are, in what manner they may be made, and other matters relating to them, and of Unions and Consolidations.</i> The
Permutation.	
Union.	
Consolidation.	

The Contents of the several Chapters contained in the Second Part of this Book, intituled, *The Law of Tythes or Tything.*

- C**Hap. 1. *What Tythes are, the several sorts and kinds thereof, and how they become due.* *Quid, quotaplex, & quomodo debet.* Page 213.
- Chap. 2. *By whom, and to whom Tythes ought to be paid.* *By whom, and to whom due.* p. 218.
- Chap. 3. *Of what things Tythes are due to be paid, and in what manner the Tythes of Corn, Hay, &c. are to be paid.* *What things are tythable. Corn, Hay, &c.* p. 235.
- Chap. 4. *Where and in what cases the Tythes of Wood ought to be paid.* *Wood.* p. 239.
- Chap. 5. *Where Tythes are due for Herbage or Agistment of Cattle, and who is to pay it.* *Herbage.* p. 247.
- Chap. 6. *Where and in what manner the Tythes of Calves, Milk, Cheese, Wooll, Lambs, Pigs, &c. are payable.* *Calves, Milk, Cheese, Wooll, Lambs, Pigs, &c.* p. 251.
- Chap. 7. *In what manner the Tythes of Seeds, Fruit, Mast, Bees, &c. are to be paid.* *Seeds, Fruit, Mast, Bees, &c.* p. 259.
- Chap. 8. *Where and in what manner the Tythes of Pigeons, Conies, Fish, Deer, and other Birds and Beasts feræ naturæ, are tythable.* *Honey. Things feræ naturæ.* p. 260.
- Chap. 9. *Of what nature the Tythes of Mills are, and in what cases payable.* *Mills.* p. 261.
- Chap. 10. *Of Tythes of Hawking, Hunting, Fishing, Fowling, &c.* *Personal Tythes, Hunting, Hawking, Fishing, Fowling, &c.* p. 263.
- other personal Tythes.* Chap.

The Contents.

Domestick Birds.	Chap. 11. Of Tythes of Ducks, Geese, Swans, Turkeys, and other domestick Fowls and Birds.	p.264.
Of what things Tythes are not payable.	Chap. 12. Of what things Tythes are not due by the Common Law.	p.264.
Customs.	Chap. 13. What force Customs have in the form and manner of Tything, and in discharging the payment thereof, and the difference between Custom and Prescription.	p.266.
Interest in the Lands.	Chap. 14. What Privileges the Parson, Vicar, &c. have in the Grounds where Tythes arise, for drying, making and carrying away the same.	p.271.
To what charge subject.	Chap. 15. To what charges the Glebe and Tythes are subject.	p.275.
Modus decimandi.	Chap. 16. How far Prescription will prevail in the manner of Tything, and in what cases a Modus decimandi, will bind the Parson, &c.	p.299.
How to be destroyed.	Chap. 17. How a Modus decimandi may be destroyed.	p.316.
How to be conveyed.	Chap. 18. By what Conveyances and Names Tythes may be granted, demised, &c. and what Demises and Leases may made by Parsons, Vicars, and other Ecclesiasticks, &c. are good.	p.317.
Of Leases.		
Barren Ground.	Chap. 19. What barren Lands are free'd from payment of Tythes within the Statute of 2 E. 6. c. 13.	p.319.
Real Compositions.	Chap. 20. What a Real composition is, and in what cases Lands shall be free'd from the payment of Tythes thereby.	p.323.
Monastery Lands.	Chap. 21. What Monastery Lands are, or may be free'd from payment of Tythes.	p.326.
Personal Tythes.	Chap. 22. What personal Tythes are, and in what cases due and payable.	p.338.
		Chap.

The Contents.

- Chap. 23. *What Oblations, Offerings, &c. are, and where due and payable.* Oblac'ons. p.342.
- Chap. 24. *What Mortuaries are, and in what cases they are due and payable.* Mortuaries. p.349.
- Chap. 25. *How Tythes are to be paid in London, and several Resolutions upon the Statute, made for the payment thereof.* London. p.350.
- Chap. 26. *In what Courts, and in what Manner, Tythes may be sued for, and in what cases Prohibitions lie for staying of Suits for Tythes in the Ecclesiastical Courts, and how to proceed therein.* How recoverable. Prohibition. p.368.
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Directions in the Marginal References.

NOte, That in my References to printed Books in this Treatise, I for the most part refer to the Page, and part of the Page, where the Matter is to be found in this manner : If the Matter be at the upper end of the Page I mark it with Three Pricks thus ∴ if in the middle thus .. if at the lower part thus ∴ and where the Book is numbred by Fol. I. add the A or the B side, as it happens.

THE

T H E

Parsons Counsellor.

C H A P. I.

*Who may, or who may not, be a Parson,
Vicar, &c.*

HAVING taken upon me to be the
Parson's Counsellor, it is necessary in
the first place, to shew who may
be a Parson, Vicar, &c.

By a Statute made in the 14th. year of ^{14 Car. 2. c. 7.}
King *Charles* the Second, all are made in-
capable of being admitted to any Parso-
nage or Vicarage, Benefice or other Eccle-
siastical Promotion, Preferment or Dignity ^{Promotion,}
whatsoever, unless such person have Episco-
pal Ordination; and if any shall presume
to be Admitted, not having such Ordination,
or shall presume to Administer the Sacra-
ment of the Lords Supper, not being so Or-
dained, he is to forfeit an hundred pounds.

B

By

Concil. Arelat.
Can. 1. Concil.
Const. cap. 14
& 15. Concil.
Neocæsar. cap.
11.
Callis Lect.
253.
Vid. Co. 2 Inst.
632.
13 Eliz. c. 12.

*By implication
this Statute al-
lows a man to
be made a
Priest at twen-
ty four, whereas
by the Canons
he could not be
a Priest before
thirty years of
Age.*

By divers ancient Canons of the Church, no man was to be a Deacon before he was twenty five years of Age, nor a Priest before he should attain the Age of thirty years; but notwithstanding the Canons, they were frequently dispensed with.

And by a Statute made in the 13th. year of Queen *Elizabeth*, it is Enacted, That none shall be made Minister, or admitted to Preach or Administer the Sacraments, being under the Age of twenty four years; nor unless he first bring to the Bishop of that Diocess, from men known to the Bishop to be of sound Religion, a Testimonial both of his honest Life, and of his professing the Doctrine expressed in the Thirty nine Articles; and unless he be able to answer and render to the Ordinary an accompt of his Faith in Latin, according to the said Articles, or have a special gift and ability to be a Preacher: Nor shall be admitted to the Order of Deacon or Ministry, unless he shall first subscribe to the said Articles.

And all Dispensations in this Case are made void by the same Statute.

So that upon the whole matter, none can be a Priest before he is four and twenty years of Age, nor none can be a Parson before he is a Priest.

Can. Jac. 33. di-
stinct. 70. cap.
Nemine.

And by divers ancient Canons, and by Canons of our own, none ought to be Ordained a Priest before he have a Title, that is, a Presentment to a Parsonage, Vicarage, or a Curacy.

And

And by another Provincial Canon of our Cap Imprimis.
own, those that have been guilty of Homicide, or that have been Advocates *in causa Sanguinis*; those that are guilty of Simony, or Makers or Solicitors of Simoniackal Contracts, Witchcraft, burners of Churches, cannot be Priests without special Dispensation, nor by consequence Parsons or Vicars. Co. 2 Inst. 632.

And by another Provincial Canon of our Cap. cum quant.
own, those that are guilty of Simony, Homicide, persons Excommunicate, * Usurers, Co 2 Inst. 632.
Sacriligious persons, Incendiaries, *vel* † *Falsarios*, may not be admitted into Holy Orders, and by consequence may not be Parsons, Vicars, &c. * Distinctio.
47. Co. 5. 58. a.
† Perjury, Forgery, dist. 50.
si Episcopus.
38 E 3 2. a. *

And by a Canon in the Council of Nice, a man that voluntarily castrated himself might not be a Priest; but if it were done by Enemies, or by the advice of Physicians for Healths sake, it was no disability.

Bastards cannot be Priests without Dispensation, nor by consequence Parsons^a. Cap. eos qui de non. Dyer 293.
5 H. 7. 20. a. *

A Villain cannot be a Parson, and if he be presented to a Living, the Bishop may refuse him^b. 14 H. 7. 28. b. *

A Miscreant that does not believe the Truth, an Infidel that does not believe at all, Jew, Schismatick or Heretick, that do not believe aright, ought not to be Parsons, and Indicted, ought to be deprived; and so if the party be Irreligious or Illiterate; so if the party presented be *mere laicus* or *outlawed*. 15 H. 7. 7. b.
5 H. 7. 20. a.
Co. 5. 58. a. *

And the Bishop may refuse a Clerk *quia iminosus*, for any of the Crimes aforesaid, though the party be not convict, so the Bishop be certain of the Truth thereof. Bro. Present 54.
a. Tyrrel.
2 Hist. 457.
29 E. 3. Fitzh.
Qu Imp. 192.
Bro Clergy. 22.
Co. 2 Inst. 632.
Swinb. of Wills 310.
b Co. 2 Inst. 632.

B 2

And

Co. 5. 58. a.
Regula.

Ibid.
Exceptio.

Co. 4. Inst. 337.
Linwood. Cap.
Cum à jure in-
hibitum. Conc.
Lateran. Can.
31.

Albany vers.
Evesque Lichf.
M. 26 & 27 El.
C. B. rot. 2023.
Cro. Eliz. 119.
Lucas vers. E-
vesque Bath.
P. 3. El. per
Bendloes.

4 Inst. 338.
1 Leonard. 130.
Dier 293. b.
Mich. 16 & 17
El. per Harper.

4 Inst. 338.
Star. 3 R. 2. c. 3.
7 R. 2. cap. 12.
5 R. 2. nu. 91.
6 R. 2. nu. 31.
10 R. 2. nu. 20.
1 H. 5. cap. 7.
Can. 23.

And all things that are just causes to de-
prive a Clerk, are just causes to refuse a Clerk
when presented. *Stillingfl. Eccles. Cases. 73.*

But it is no good cause to refuse a Clerk,
because he is a Player at unlawful Games, or
a Haunter of Taverns : Because these are
not *malum in se*, but *malum prohibitum*.

And the Son cannot, without a Dispensa-
tion, be Parson of the same Church that his Fa-
ther was Incumbent of the next before him.

A man that cannot speak such Language
as the Parishioners understand, ought not to
be admitted Parson of such a Parish, but
may be refused by the Bishop : For to be
illiterate, and not to be understood, is all one
to the Parishioners : And when the blind
leads the blind, both fall into the Pit.

The Bishop cannot refuse a Clerk, because
he wants a Testimonial. *See Stillingfl. Eccles.
Cases, 74, 75.*

But it seems that if the Bishop does admit
and institute any person into a Living that lies
under any of these Incapacities, the Church is
till *de facto* till Sentence of Deprivation, Nulli-
ty, &c. as the case requires, and no Lapse in-
curs.

An Alien born at this day, cannot be a
Parson, Vicar, &c. nor is capable of any Spirit-
ual Preferment, without the Kings special Li-
cence, and the Bishop may deny to admit
and institute him, as Sir *Edward Coke* con-
ceives.

By a Canon in the third Council of La-
teran, under *Alexander* the Third, it was de-
creed that none should be Parson of a Parish
under 25 years of Age.

Out-

Outlawry and Laity are Disabilities. Co.
2. Inst. 632.

Vide Levit. cap. 21. ver. 17, 18, 19, 20, & 21.
What bodily blemishes disabled Priesthood
under the Law.

CHAP. II.

*How one qualified to be a Parson, ought
to behave himself in obtaining a Li-
ving.*

A Parson qualified as the Law requires,
must without any corrupt or symo-
niacal Contract, obtain a Presentation from
the right and undoubted Patron of the
Church, whereof he designs to be Parson;
which may be in this Form:

*Reverendo in Christo Patri & Domino T. The Form of a
Divina permissione L. & C. Episcopo, ejusve Vi- Presentation.
ario in spiritualibus generali A. B. Armiger, in- See other Forms
habitatus Patronus Ecclesiæ Parochialis de C. of Presentations.
Comitatu D. salutem in Domino sempiternam. Regist. orig.
Ad Ecclesiam de C. prædictam vestræ Dioceſios, 301.
modo per mortem, (if void by the death of
the last Incumbent;) but if it be by Resig-
nation, then you must say (*modo per resigna-
tionem*); but if the Church be void by the
last Incumbent's being made a Bishop, or by
taking a second Living, not being qualified,
then you may say (*per cessionem*) or as the
special Matter is; or if by Deprivation,
then you must say (*per deprivationem*)
and then proceed, E. F. *ultimi incum-
antis ibidem jam vacantem, & ad meam**

donationem pleno jure spectantem, dilectum mihi in Christo G.H. Clericum in Artibus Magistrum, paternitati vestrae præsento, humiliter supplicans, quatenus præfatum G. H. ad dictam Ecclesiam admittere, eumque Rectorem ejusdem Ecclesiae instituere cum suis juribus & pertinentiis universis, cæteraque expedire & peragere, quæ vestro in hac parte incumbunt officio pastoralis, dignemini cum favore. In cujus rei Testimonium his præsentibus sigillum meum apposui: Datum primo die M. Anno Regni Domini nostri Caroli secundi, Dei gratia, Angliæ, Scotiæ, Franciæ & Hiberniæ, Regis, fidei defensoris, &c. vicissimo octavo, Annoq; Domini 1675.

¹ Inst. 120 b.
F. Qu. Imp. 60.

And note, That the King, or any other Patron, may Present by word of Mouth, or by Letter, and it is as good and effectual as one in Form.

How to proceed upon the Presentation:

22 H. 6. 29 b.
Doct. & Stud.
l. 2. c. 31.

Dier 327 p 7.
Rol. 2. 364. b. f.

What time the Bishop may take to examine a Clerk.

Lindw. chap.
Cum secundum Apostolum.

1 H. 7. 9. b.

As soon as a Clerk has obtained such Presentation, it behoves him with all convenient speed, and within six months after the Church became void by Death, Creation or Cession of the last Incumbent, of which Avoidances the Patron is at his peril to take notice, or within six months after notice legally given to the Patron by the Ordinary of the Church becoming void by Deprivation, or Resignation, to tender his Presentation to the Bishop of that Diocese within which the Church is, or to his Vicar-General, or in the Vacation when there is no Bishop of such Diocese, to the Guardians of the Spiritualties, to whom the Law allows a reasonable time to examine the abilities of the Clerk: For the Ordinary is not bound as soon as a Clerk tender

tenders his Presentation to dispatch his business*; but if he be busy about the affairs of his Church, he may make the Clerk to stay till he hath done, or may appoint him a convenient time to attend him for his approbation.

† By the ancient Canons, the Bishop had two Months time to consider of the ability and disability of the Clerk; but by a Canon made in the time of King James, that time is abbreviated to one Month.

Then if the Ordinary, &c. upon the examination of the Clerk, find him fit in all points, as above in the first Chapter is directed, then he admits him in these words, *Admitto te habilem, &c.* And thereupon the Ordinary institutes him in these words, *Instituo te Rectorem Ecclesiæ Parochialis de C. & habere curam animarum: & accipe curam tuam & meam.* And this the Bishop may do as well out of his Diocese as within it; for as to this matter, it is not local, but follows the Person of the Bishop whithersoever he goes. When the Bishop has instituted the Clerk, the Ordinary, or, &c. makes a Mandate under Seal to the Archdeacon of the place*, or to such other Clergy-men as he pleases, to induct the Clerk. And it may be made † by the Dean and Chapter, but not by the Patron: For though by the Institution the Church is full against all persons, save the King, yet he is not compleat Parson till induction; for by the Institution he is admitted *ad officium* to pray and preach, yet he is not intitled *ad beneficium*, until he be formally inducted, which may be done by the

* Hob. 317.
15 H.7.7.b.
† Canon 95.
The Canon Law allows two Months, but the Common Law, which in all these Cases is to be preferred, allows only convenient time.

Admission and Institution.
Co.4.79.a.
32 H.6.28.b.
33 H.6.24.a.
38 H.6.15.a.
Knowles vers.
Dobbins, P.
21 Jac.C.B.
Carter vers.
Crofts, 27 El.
C.B.
Who may make Induction.
a Selden de Dec.385.394.
* Callis versus Launt.
† 11 H.4.9.b.
Parson Den-ny's Case.
H.6. Jac.10.
190.b.B.R.
Plowd.528.b.
How Induction is to be made.
Lindsey versus Dodson, M.
9 Jac.C.B.

Selden de Dec.
86.

33 H.6.24.2.

Lindwood cap.

Item quia Archidiaconi, &c.

Hill. 45 El. C. B.

F. N. B. 74. H.

56. b.

26 H. 8. 3. per
Knightly.

Yelvert. 100.

Co. 6. 61. b.

62. a. 2 Inst.

361.

Selden de Dec.

389.

Hughs Parsons

Law. 67.

*What's to be
done after In-
duction.*

*From what
time the six
Months shall
commence.*

delivering of the Ring of the Church-door, or Latch of the Church-gate, or by delivery of a Clod or Turf, and Twig of the Glebe; but the most common and usual way is, and therefore the safest, by delivery of the Bell-rope to the new instituted Clerk, and he tolling the Bell: And the Archdeacon, if he do it, is to take but 40 *d.* for doing of it.

And an Action of the Case will lie against the Archdeacon, if he refuse or neglect to do his duty, or the Clerk may compel him to do his duty in the Ecclesiastical Court; and note that the Church is full against every body but the King, by the Institution, but not against the King till Induction. *Co. 1 Inst. 119. b. 344. a. Cro. Jac. 463.* And some hold that the Queen has the same Prerogative. *Se/ Co. 1 Inst. 133. a.*

Now note, that the 6 months, within which the Patron is to present, are to be accounted by 182 days, and not by 28 days to the month.

And note, that the Clerk is to do many things more at the time of the Institution, and after his Induction, to secure himself in his Living, which he will find in the sixth Chapter following, to which I refer him, and wherein very great care is to be taken, that all things be duly performed and observed.

There hath been some dispute, whether the six months shall commence from the time of the death of the last Incumbent, or other Avoidance, or from such time as the Patron could reasonably have notice, considering the distance of place; and more particularly, where the Patron or Incumbent should happen to be beyond the Seas at the time of the Avoidance.

And

And there hath been a Canon, *Quod tempus semestre non incipit versus patronos, nisi à tempore scientiæ mortis personæ.* Rol. 2.363.9.

But by the Common Law of England, I conceive the Patron is bound to take notice of the Death, Creation or Cession, as afore-said.

And this is proved by the Register, where in a Prohibition it is said, *Quia secundum legem & consuetudinem Regni nostri Angliæ Episcopi, &c. beneficia vacantia per lapsum temporis ante sex menses vacationum eorundem transactos conferre non debent, nec conferre consueverunt, aliquibus temporibus exceptis.* So that it appears by this Writ, that the time of the six months to collate by Lapse commences from the Vacancy, and not from the Notice: But this must be intended of such Avoidances, whereof the Patron is bound to take notice as afore-said. *Regist. orig. 42*

And it is also to be observed, that if the Patron do present his Clerk, which is refused by the Ordinary, because he is illiterate, criminalous, &c. there the Patron shall have no longer time to present but six months from the time of the Avoidance, where the Patron is bound to take notice of it, and six months from the time of notice, where the Ordinary is bound to give notice of the Avoidance. *Kelw. 50. b. 1. 34 H. 7. 21. a. 14 H. 7. 21. a. Dyer 227. p. 7. The Patron presents after Lapse incurred. 13 E. 4. 3. b. 11 H. 4. 80. a. Hob. 154. Hutton 24. 32 E. 3. 2. 11 H. 4. 80. 43 E. 3. 11. Lindwood. Si aliquo ex causa, &c. verba injuria.*

But note, that in all cases, if a Church Lapse to the Bishop or Archbishop, and the Patron present his Clerk before the Bishop or Archbishop have collated; the Bishop, &c. is bound to admit the Clerk of the true Patron, and cannot take advantage of the Lapse.

B. Plenarry
15 Doct. &
Stud. 1.294.

Lapse. But the Canonists as should seem, hold the contrary; but the Common Law in this, as in other things, is to be preferred.

Dy. 277.p.56.

But if the Bishop collate, and the Patron present before Induction, he comes too late.

Quære.

But the great Question is, if the Church Lapse to the King, and the Patron presents before the King takes advantage of the Lapse, Whether this shall avoid the Kings Title by Lapse? It is made a *Quære* by Dyer:

Dy. 277.p.55.

Hob. 152.

Hut. 24.

* Cro. El. 119.

Cro. Jac. 216.

Owen 3 & 5.

But Hobart seems to be clear in it, that the King shall not have the benefit of the Lapse; but divers* Authorities are against him, *Ideo quære.* Rolls 2.368. b. 17 E.3.84. b. Co.7.28. Doct. & Stud. lib.2. cap.31.

What time the Patron has to present.

Screne Regiam
Majestatem.
10. b.

Chap. Quoniam
verbum devol-
vatur.

Selden de De-
cimis 390.

There have been some opinions amongst the Canonists, that a Lay-Patron should have but four months to present, but an Ecclesiastical person shall have six months; and so it is said is the Law of Scotland, but the Common Law, which rules the point here, and with more reason, gives the Patron in both Cases six months.

Doct. & Stud.

ubi supra

Co.6.19.b.2.

Cro. El. 119.

Dier 328.a.

In the Cases of Deprivation and Resignation, where the Patron is to have notice before the Church can Lapse, the Patron is not bound to take notice from any body but the Bishop himself, or other Ordinary; which must be given personally to the Patron, if he live in the same County; but if the Patron live in a Foreign Courty, then the notice may be published in the Parish Church, and affixed on the Church Door: And such notice must express in certain the Cause

Cause of the Deprivation, &c. and it must be *verè, propriè, personalitèr, & non fictè*, by the Ecclesiastical Laws. There are several other ways that a Church may become void, of which the Patron is at his peril to take notice, as Union, not payment of Tenths, &c.

Dyer 346. a.
Co. 6. 29. b.
Dyer 346. b.
Harp. 3 & 4 El.
Dyer 237.
P. 29. 255. p. 5.
13 El. c. 12.

But no Lapse shall incur by any Deprivation *ipso facto* by the Statute of 13 Eliz. until six months after notice.

C H A P. III.

In what Case it is necessary that the Bishop have a Jure Patronatus, and how the same is to be proceeded in, and what is the effect and fruit of the same.

IF two Patrons present to one and the same Church by several Titles, the Church is become litigious; because the Bishop knows not which hath the very true and rightful Title to the same, and by consequence knows not which Clerk to admit. And I take it, the Church is not less litigious, though they both present the same person; because when the Bishop admits him as the Clerk of the one, he puts the other out of possession, and consequently to his

In what cases a Church shall be said litigious.
Doct. & Stud.
116. a.

his Action ; and the Bishop becomes a Disturber, if he who is put out of possession prove to have a better Title.

Where a Jure Patronatus is necessary, and how to be proceeded in.

Infra 19.

* 34 H.6.38. b.

35 H.6.18. b. 19. a.

Now the Bishop in this case, to secure himself, ought to award a *Jure Patronatus* to inquire of the Right; which is meerly an Inquest of Office in nature of a Writ *de proprietate probanda*, and does not at all * bind the Title or Right of the Party.

But it seems a question in our Books, Whether the Bishop is bound to sue the *Jure Patronatus* at his own cost and peril, or only at the Prayer, and at the cost of the party that prays is or of both parties? But the better Opinion seems to be, and so is the Practice, that the same is to be sued at the prayer, and at the cost of one of the parties that prays it, or of both the parties if they joyn.

34 H.6.11. a.

Hob. 317.

34 H.6.38.

5 H.7.22. a. it

is made a

Quere.

Now whereas the Church may become litigious by double or plural Presentations, so it may become more litigious by the *Jure Patronatus*; for if two Patrons present, and each of them prays a *Jure Patronatus* by himself (as they may) and the one Jury gives a Verdict for the one's Title, and the other for the other's Title; here the Bishop receives no direction at all, but the Church still remains litigious.

But here arises another great question, Whether the Bishop in this Case may let the Church lapse and collate? Or whether he be not bound to admit one of the Clerks at his Election, or at his peril? Mr. Serjeant *Callis* in his Reading, was of Opinion, he might refuse both Clerks in this Case, and suffer the Church to Lapse; and so

Callis Read. 3.

21 H.6.44. a.

Quere.

is the Book in 21 H. 6. by Newton and
laſton. Tamen inde quere.

And as a Church may become litigious ^{41 H. 6. 45. a.}
 by a *Jure Patronatus*; ſo it may become
 litigious after a *Jure Patronatus*, and a Ver-
 dict given for one of the parties; for if a
Jure Patronatus be awarded, and a Verdict
 given for one of the parties, and before
 the Patron preſents, for whom the Verdict
 was given, and prays admittance of his
 Clerk (as he ought to do, before the Biſhop
 is bound to admit his Clerk) another pre-
 ſents; here the Church is become litigious *de*
novo, and the Biſhop in this caſe, as it ſeems,
 may award a new *Jure Patronatus* to deter-
 mine the right of Patronage between the
 new and the old Patron, for whom the
 Title was found in the former.

But ſome have thought, that though the ^{21 H. 6. 44.}
 Church be not litigious by double or plural ^{*Callis Reading*}
 Preſentations, yet the Biſhop, if he doubt of ^{29.}
 the Patrons Title that preſents, may award ^{Hob. 318.}
 a *Jure Patronatus*, and inquire of ſuch Pa-
 tron's Title, and by that means prevent the
 ſurpriſe that may happen to other preten-
 ders by ſudden admiſſion of the Clerk; and
 in caſe the right of Patronage be found for
 a Stranger, the Biſhop may admit his Clerk. ^{† 34 H. 6. 44. a.}
^{Hob. 317.}

But it ſeems, that if the Biſhop admit the
 Clerk that is preſented before the Church be-
 comes litigious by a ſecond Preſentation, the
 Biſhop acquits himſelf thereby from being
 a Diſturber; but by this means the Biſhop
 may do great wrong in ſurpriſing other
 Patrons that have right: And the Law doth
 not ſo haſten the Biſhops proceeding, but
 that

that, as hath been said, he may take convenient time to examine the Clerk, that other Pretenders may take notice of the Vacancy.

Hob. 317.

But though the Church, by any of the means abovesaid, be become litigious, yet I think there is no doubt, but that the Bishop may admit either Clerk without a *Fure Patronatus*; but then he doth it at a double peril; for if the Patron, whose Clerk he admits, have not a good Title, or having a good Title, do not make it out in a *Quare Impedit*, or other Action brought for the Church, the Bishop will be made a Disturber.

And the Bishop may thereby do great wrong to the true Patron, by putting him out of possession of his Church, and forcing him to an Action that may turn much to his charge and trouble, besides great damage to his Clerk, and oft to the loss of the Advowson; therefore Bishops ought in this case to be very tender to proceed according to justice. But if the Patron fear any foul play from the Bishop, and be not resolved of his Clerk, he may enter a Caveat with the Bishop, not to admit the Clerk of any other; and though this do not so bind up the Bishop, that he cannot *admit the Clerk of another person, yet if the Bishop will presume to do it without a *Fure Patronatus*, he may be punished by his Superior.

Rolls 2. 361.

m. 3.

* Contra Poph.

143.

Seiomor.

Zouch versus
Evesque Peter-
borough & al.
T. 38. Eliz. B.R.

But in case the Bishop delay to admit the true Patron's Clerk, he may sue a *Duplex Querela* out of the *Arches*, to command the Bishop to admit his Clerk; and then if the Bishop do not admit the Clerk within nine
days,

days, or the space assigned by the *Duplex Querela*, or return a legal cause why he does not, the *Metropolitan* may admit the Clerk in the Ordinaries default.

If the Archbishop institute in the Bishop's default, and the Bishop appeal after Induction, a Prohibition lies. Bendl. 2. 293.
M. 10.
2 Roll. 293.
M. 10.

But the Bishop may return, if the truth be so, that the Church is litigious, and that he cannot admit the Clerk till the Right be determined in a *Jure Patronatus*, which will excuse him,

But the surest and safest way in this case, if the Bishop delay the true Patron, immediately to sue a *Quare Impedit*, and thereupon a *Ne Admittas* to the Bishop; and then if the Bishop, after the receipt of such Writ, admit the Clerk of any other person without a Verdict in a *Jure Patronatus*, the true Patron may have a Writ called a *Quare Incumbavit* against the Bishop, and may therein recover the Presentment with damages. F.N.B. 37. f.
F.N.B. 4. 8. g. h.
Ibid. l. 21. E. 3.
3. 2.

And it should seem this Writ lies, in case the Bishop admit the Clerk of the adverse Patron, notwithstanding he hath obtained a Verdict in a *Jure Patronatus*; but this must be intended, I conceive, where such Patron Defendant in the *Quare Impedit*. F.N.B. 48. h.

And note, That a Caveat entred in the life of the former Incumbent, is of no force. Cr. Jac. 463.

And note, That by a Canon made in the time of King James, the Patron or Clerk cannot have a *Duplex Querela* till 28 days are expired from the time the Clerk was presented. Can. 95.

And

How far the
Bishop is bound
by a Verdict in
a Jure Patro-
natus.

34 H.6.11.b.
Hob. 318.

And it seems likewise, that the Bishop is not so bound by the Verdict in a *Jure Patronatus*, but that he may admit the contrary Clerk, if he see cause, or be satisfied he has the better Title; but this seems to be against Justice, and the true intent of the Law.

And Sir Henry Hobart was of Opinion, That an Action of the Case lies against the Bishop by the Patron that is so disturbed, if in a *Quare Impedit* he prove to have the better Title, and recover his damages by reason of the delay and trouble the Bishop hath thereby put the Patron to; but then the Bishop must not be made a Defendant in the *Quare Impedit*: But of this *Quare*.

Quære.
The manner of
proceeding in
a Jure Patro-
natus.

Now the manner and form of proceeding in a *Jure Patronatus* is thus: The Bishop issues forth a Commission under his Seal to his Chancellor, or some other persons, whom he pleases, that are expert in the Canon and Ecclesiastical Laws: In which Commission (since the Title of Patronages is determinable at the Common Law) it were not amiss to joyn some common Lawyer of eminent Learning and Integrity; and these Commissioners are by him authorized to summon a *Jure Patronatus*, and to proceed to the determination thereof, and then the Commissioner or Commissioners so authorized issue out a Mandate to some Officer of their own to summon a Jury, which must be one half Clerks, and the other half Laymen; and if they refuse, being duly summoned, to appear, the Commissioners may proceed against the Clergy-men by Sequestration,

22 H.6.29. b.

stration, and the Lay-men by Ecclesiastical Censures to compel an Appearance.

When a full Jury of Clergy-men and Laicks appear, which must be six of each at least, the Commissioners are to swear first a Clergy-man, and then a Lay-man, till Twelve be sworn at least of the Jury: But the Commissioners may swear a greater number than Twelve of the Jury, if they please, or see cause, so always that there be an equal number of Lay-men and Clergy-men sworn in the whole.

The Points inquirable by this Commission are five: *Callis Reading 29.*

1. *Si Ecclesia vacat, & quomodo vacavit?* *The Points inquirable in a June Patronatus.*

2. *Quis Patronus ultimo præsentavit?*

3. *Quis est verus & indubitatus Patronus?*

4. *Quis præsentare debet ad Ecclesiam nunc vacantem?* *Vide Lindwood per nostram Provinciam verbo Inquisitionem.*

5. *De Idonitate personæ præsentatæ.*

But the Civilians vary in their Articles at pleasure.

But the main and chief Points are the third and fourth; the last resting wholly in the Judgment of the Bishop.

After the Jury is sworn and charged, the Council and Advocates of both parties are to shew their respective Clients Titles, and produce their Evidences to prove the same. And after the Evidence is given on both sides, and Counsel fully heard, the Jury may give their Verdicts forthwith, or the Commissioners may give them time to consider

consider of their Evidence, and may assign them another time and place for the giving their Verdict, as in other Inquests of Office; but I like much better (to avoid being tampered with) that they give their Verdicts forthwith before they part, unless new Evidence be expected.

The effect of a Jure Patronatus.

The Effect of this Suit is no more but for the Bishops security, that he may avoid being a Disturber; for the Verdict of this Jury is a sufficient warrant for the Bishop to admit and institute his Clerk, for whose Title the Verdict is given, and the Bishop for so doing shall never be made a Disturber, though the other Patron against whom the Verdict is given, shall after recover in a *Quare Impedit*, or other Action.

What is to be done, if the Jury will not give a Verdict.

35 H. 6. 18. b &c.

But suppose the Jury will not agree of their Verdict, and the one half be for the one Patron, and the other half for the other Patron; or, that they refuse to give any Verdict at all; or if they find a special Verdict, as I suppose they may; the Bishop in all these Cases is left to proceed at his peril, as though no *Jure Patronatus* had issued at all; or perhaps in this case he may discharge the Jury, and summon a new *Jure Patronatus*.

34 H. 6. 12. a.

Callis Read. 29

What is to be done where Coparceners, Joynt tenants, or Tenants in Common present severally.

And it is to be observed, that after a Verdict found in a *Jure Patronatus* for the Patron, the Patron must again request the Bishop to admit his Clerk; otherwise, if the Church Lapse after six months, the Bishop may collate.

But

But if two Coparceners present several Clerks by the same Title, this doth not make the Church litigious, but the Bishop is bound to admit the Clerk of the elder Sister: But this is to be intended where the eldest Sister presents alone, and not joyntly with any other of the Co-heirs.

But if two Joynt-tenants or Tenants in Common present several Clerks, that makes not the Church litigious; for the Bishop may admit the Clerk of which he pleases: Or if they do not agree and joyn in presenting a Clerk within the six months, the Bishop may collate.

Parceners made partition to present by turn, and usurpation was made in the turn of them, the Court inclined that it should put all out of Possession.

And note, That the Bishop needs not to make Commissioners to enquire *De Jure Patronatus*; but he may, if he pleases, do the same himself: and therefore, if his Commissioners neglect to do their duties, it shall not excuse him, because it was his folly to name such Commissioners. But the Opinion of the Civilians seems otherwise: For they say, that the party shall name the Commissioners; and if they neglect their duties, it shall be at the peradventure of the party that names them. And though they make a false return, or no return at all, it shall excuse the Bishop; and the party grieved is left to his Action against the Commissioners.

And, as has been said, the Verdict in a *Jure Patronatus* does not bind the adverse party's Title, though it may be some evidence for

Doct. & Stud.

115. b.

C. 1. Inst. 243. a.

21 H. 6. 45. a.

per *Assue*.

34 H. 6. 40.

5 H. 7. 8. causa

16. q. 7. confa-

derandum est.

11 H. 4. 58.

33 H. 6. 32.

1 Inst. 186. b.

Doct. & Stud.

115. b.

Kite versus E-

vesque Bristol,

P. 7 Jac. C. B.

1 Inst. 186. b.

6 Ed. 4. 10. b.

34 H. 6. 40. b.

Ubi supra.

Pasch. 35. Car. 2

C. B. 2. Venir. 39

If the Commis-

sioners neglect

their duties.

22 H. 6. 30. a.

22 E. 4. 66.

13 H. 8. 12.

33 H. 6. 62.

him whose Title is found to be the best.

If there be three Joyntenants of an Advowson, the Church whereof becomes void, it has been a question, if two of the Joyntenants may present the third, *Dyer* 304. b. 14 H. 8. 2. *Moor* p. 14. *Bendl.* 34.

C H A P. IV.

How the Law stood concerning Pluralities before the Statute of 21 H. 8. cap. 13. Who are qualified within that Law to have Pluralities; and how qualified persons ought to behave themselves in taking the second Livings, so that the former may not be void.

What a Plurality is.

Co. 4. 90. b. Co. Mag. Chart 626. Vide the Records there Cited.

A Plurality is, where one and the same person obtains two or more Spiritual Preterments with Cure of Souls, or without; against which there have been several Canons, and they have been always discountenanced at the Common Law, and several Complaints have been made against them in Parliament; yet the Pope held them up by his Dispensations. How agreeable these Dispensations were to God's Service; nay, how prejudicial they have been to the advance of the Christian Religion, and are, I leave others to judge; it being no part of my Undertaking. And though I find

find a great Judge of this Nation defending
 of them; yet I find a Canon in the Ge-
 neral Council of *Lateran* against them, in
 the Year 1215. in these words, *Statutum est*
quod, quicumque receperit aliquod beneficium ha-
bens curam animarum annexam, si prius tale
beneficium obtinebat, eo sit jure ipso privatus,
& si forte illud retinere contenderit, alio etiam
spolietur. Is quoque, ad quem prioris spectat
donatio, illud post receptionem alterius conferat
cui merito viderit conferendum.

Hob. 149.

Concil. tom. 4.

221. ca. 29.

Concil. Lar. 4.

1215. cap. 29.

Concil. Lar. 3.

1180. ca. 13.

Canon against

Pluralities.

Co. 4. 79 a.

Clement tit. 2.

cap. 3. gloss.

Beneficia que

requirunt refi-

dentiam sunt

incapabilia.

* Can. 5.

Note, Those

Livings are

said to be in-

compatible that

have Cure of

Souls, or are

forbid to be

held together

by some Canon.

Tom. 5. 368.

cap. 64.

The effect of

Pluralities.

Co. 4. 79. b.

Clement. l. 3.

tit. 2. ca. 3.

Gratian. causa

21. q. 1. Mag.

And by another Council there held under
 Leo the 10th. Anno Dom. 1123, it is further
 decreed, that *Dispensationes autem ad plura*
incompatibilia ultra duo, nisi qualificatis juxta
formam juris communis non concedantur, nisi ex
magna & urgente causa.

And now let me tell you the fruits of
 Pluralities out of another Council, which is
 delivered in these words: *Res ipsa loquitur,*
plura beneficia, potissimum quibus cura anima-
rum submissa est, non sine gravi Ecclesiarum
damno ab uno obtineri; cum unus in pluribus
Ecclesiis rite officia persolvere, aut rebus earum
necessariam curam impendere, nequeat.

Yet the Canonists allow of Pluralities in
 six Case:

1. When the Churches are so poor, that
 either by it self will not maintain a
 Minister.
2. In such cases as the Bishop dispenses
 with them.
3. Where there is a scarcity of Clerks.

C 3

4. Where

4. Where the Clerk has one by Title, and the other by *Commendam*.
 5. By Grant from the Pope.
 6. Where two Churches are united, or depend the one upon another.
- Which *Hofiens.* renders thus:

*Ecclesias plures nullus de jure tenebit.
Dependens, tenuis, rarus, vel gratia Papæ.
Utilitas urgens, & commendatio justa.*

Conc. Lateran.
sub Alex. 4.
1180.

But, as I take it, the Council of *Lateran* reduces all these qualifications to the Pope's Dispensations. The Canon is as follows:

Can. 29.
Vide Decretals
Gregor. de
Præbendis, &c.
Lib. 3. tit. 5.
cap. ad hæc.

Cum fuit in hoc Concilio prohibitum ut nullus diversas dignitates Ecclesiasticas, & plures Ecclesias Parochiales reciperet contra Sacrorum Canonum instituta. Hoc idem in personalibus discernimus observandum, addentes, ut in eadem Ecclesia nullus plures dignitates habere præsumat, aut personatus, etiamsi curam non habeant animarum. Circa sublimes tamen & literatas personas, quæ majoribus sunt beneficiis honorandæ (cum ratio postulaverit) per Sedem Apostolicam poterit dispensari, &c.

Dier 273.p.35.

And upon this Canon, *Goodman*, Dean of *Wells*, was deprived of his Deanery, because he had accepted the Prebend of *Wiveliscome* in the same Church, in the time of *E. 6.* And note, These Presentments were not within the Statute of *Pluralities*, but are left as they were upon the Canon Law; for the Statute only extends to Livings with cure of Souls.

I might enlarge much more upon this Subject; but it being collateral to what I design, this Taste shall serve. And if any body desire further satisfaction upon this Subject, I commend him to the History of the Council of *Trent*; where he will find, That by the greater and better Opinion of that Council, Residence by him that hath a Preferment in the Church with Cure of Souls is of Divine Right; and that therefore the Pope had no power to dispense with Non-residence, the consequence of which is, That it is against Divine Right for any to take more Benefices than one with Cure of Souls, because the same person cannot be resident in two places at one and the same time, to discharge his duty; which requires a constant attendance.

But as the Pope by stratagem made the endeavours of all the good Men in that Council ineffectual, so by his frequent Dispensations to take Pluralities without number or measure, he made the Canons of the Church of no other effect than to increase his own Revenue by Dispensations.

And it should seem the Council of *Lateran* was received and approved (as to that point) in this Kingdom, and the Law was always taken, that he that had one Living with Cure of Souls, and without Dispensation accepted another with Cure of Souls, made the first void: So that the Patron of the first Church might present a new Clerk, and needed not to stay till the former Clerk should be legally deprived.

Conc. Trident.
495.

More 119.

Acceptance of
a second Li-
ving makes
the first void.

24 E.1. 29.b.
25 E.3. 49.a.
55. b.
11 H.4.60.a.
per Hill.
14 H.8.17.a.

But in this case the Church doth not
 lapse till the end of six Months, to be ac-
 counted from the time the Patron hath
 legal Notice of the Vacancy from the Bi-
 shop; but after Induction, the Patron, as it
 should seem, is bound to take Notice at his
 peril: And as to all others, but the Patron,
 the Church remained full till Induction into
 the second Living; and so are all the Books
 that seem *prima facie* to differ, recon-
 ciled.

Co. 4. 95. b.
 44 E. 3. 22. a.
 9 E. 3. 22. a.
 10 E. 3. 1.
 14 H. 8. 17. a.
 14 H. 7. 28. b.
 F. N. B. 34. L.
 15 E. 3. 9.
 11 H. 4. 37.
 Cro. Car. 357.
Several Acts to
restrain the
Pope.

27 E. 3. cap. 1.
 3 R. 2. cap. 3.
 7 R. 2. cap. 12.
 2 H. 4. cap. 4.
 38 E. 3. cap. 1.
 16 R. 2. cap. 5.
 6 H. 4. cap. 1.
 25 E. 3. of Pro-
 visions; and
 27 E. 3. cap. 1.
 6 H. 4. cap. 1.

But the Parliament of England, that in
 all Ages made bold with his Holiness, and
 to restrain the exorbitances of the Pope
 and Court of Rome, as the Reader may see,
 if he please to satisfy himself by the several
 Acts of Parliament mentioned in the Mar-
 gent against Provisions suing at Rome, im-
 peaching Judgments given at the Com-
 mon Law, Aliens being Beneficed within
 this Realm, priviledging Religious Orders
 from payment of Tithes, and many other
 things; and I cannot forbear to observe
 to the Reader the boldness of the Parlia-
 ment in the sixth year of H. 4. with his
 Holiness, where they restrain the giving of
 exorbitant and unjust Fees for the Investi-
 tures of Bishops.

The Act begins thus:

*Whereas there is a damnable Custom in the
 Court of Rome, to take more for the Investi-
 ture of Bishops, &c.*

Certainly these brave Parliamenteers ne-
 ver expected his Holiness's Indulgence or
 Pardon, this seeming a sin as high as that
 against the Holy Ghost, to charge their
 Holy

Holy Father with a damnable Custom in his Court, to use Extortion and Symony.

And the Council of *Lateran*, under *Leo* Can. 8. the 10th. Anno Dom. 1523. dealt almost as plainly with his Holiness, speaking of Symony; that Council has it, *Ut nefariae Simoniae labes & pestis non solum * a Romana * Nota. Curia, sed etiam ab omni Christiana ditione, in perpetuum dejiciatur, constitutiones per antecessores nostros etiam in sacris Conciliis nostris editas contra hujusmodi Simoniacos, innovamus: Easque inviolabiliter observari precipimus.*

But to return: The Parliament to prevent the mischiefs of these Dispensations, made a Law in the twenty first year of H. 8. That if any Person or Persons, having (that is, being instituted) one Benefice with Cure of Souls, being of the yearly value of eight pounds or above, shall accept and take any other with Cure of Souls, and be Instituted and Inducted into the possession of the same, that then, immediately after such possession had thereof, the first Benefice should be void.

The Act against Pluralities.

21 H 8. c. 13.

Co. 4. 79. b.

This is a con-

fimation of

the Canon,

where the Li-

ving is above

8 l. per annum

but does not

annul the Ca-

non Law in

other cases; so

that the effect

of this Law is,

that it takes

away Dispen-

sations in this

case, but leaves

the smaller Li-

ving, as they

were before.

And that it should be lawful to every Patron having the Advowson thereof to present another, and the Presentee to have the benefit of the same, as though the Incumbent had died or resigned, and that any licence, union, or other Dispensation contrary to that Act should be void.

If

If this Act had gone no further, it had been an excellent Law: But there are so many qualifications in this Law that wholly defeat the benefit of it, since the Nobility are grown so numerous as they are at this day; so that the grievance is now become as great as ever, if not greater, and deserves a new and stricter Reformation; for almost all the greatest and best Livings of the Kingdom are now held by Pluralists, and served by mean Curates.

But now let me return to the Act, and observe:

Stillingsd. Ecel. cases 99.

Cro. 6. ca. 45.

P. 19 Jac C.B.

Evesque Durham versus Evesque Peterborough.

Roy versus Evesque Br. & Handly T.

44 El. B. R.

Rot. 564.

The Court was divided.

* Dyer 237.

p. 29.

Cro. Eliz 853.

Quere.

Bushy versus Smith.

T. 40 Eliz.

Rot. 123.

Noy 38.

That this Act has only provided a Remedy, where the first Living is of the yearly value of Eight pounds or above, which must be understood according to the valuation taken in the Twenty ninth year of King *Edward* the First, till the Twenty sixth of *Henry* the Eighth; and after that time, according to the valuation then returned into the *Exchequer*, and now made use of in the *First-fruits* Office. * But many former Opinions and Books have been, that the Valuation ought to be according to the true value. *Ideo Quere.*

This point was moved in *Shute* and *Higden's Case*, *Vaughan* 130. but was not settled, so it remains a *Quere* still. Vide *Vaughan*, *Shute* versus *Higden*.

But in case the first Living be under the yearly value of Eight pounds, or a *sine cura*, then the party may accept a second, as he might have done before this Act, with a Dispenstation, which he needs not now to go to

to Rome for, although he be not qualified within this Law.

But I conceive, if an Incumbent of a Living under the Value, take a second Living without a Dispensation, that the first Living is void by the Canon Law, though it be not so by the Statute.

But by this Act there are several persons *Who are qualified to have and retain Pluralities; lified to have Pluralities.* and those are of three sorts :

1. By Service.
2. By their Birth. And,
3. By Dignities.

And first of those that are qualified by Service.

1. All the Kings Chaplains, which are *Qualifications.* not of his Council) and of the Queen, Prince, Princess, and Brethren and Sisters, Uncles and Aunts of the King.

2. Eight Chaplains of every Archbishop.

3. Six Chaplains of every Duke.

4. Five Chaplains of every Marquess and Earl.

5. Six Chaplains of every Bishop.

6. Four Chaplains of every Viscount.

7. Three Chaplains of the Lord Chancellor, and of every Knight of the Garter and Baron.

8. Two Chaplains of every Dutchesse, Marchioness, Countess and Baroness, being Widows.

9. Two

9. Two Chaplains of the Treasurer and Comptroller of the King's House; the King's Secretary, the King's Almoner, Clerk of the Closet, and Master of the Rolls.

10. One Chaplain of the Chief Justice of the *Kings-Bench*, and Warden of the *Cinque-Ports* for the time being.

All these, in respect of their Services, may purchase License or Dispensations, and take, receive and keep two Parsonages or Benefices with cure of Souls, notwithstanding this Act.

But those of the King's Chaplains, that are sworn of the King's Council, may purchase License or Dispensations, and take, receive and keep three Parsonages, or, &c. with cure of Souls.

*Qualification
by Birth.*

2. The second Qualification is by Birth; that is, the Brothers and Sons of all Temporal Lords and of Knights, born in Wedlock, may purchase License or Dispensations, and take, receive and keep two Parsonages, &c. with cure of Souls.

In which Qualification it is to be observed, That no provision is made for Bastards, nor for the Sons of Bishops, Abbots, Priors, &c.

And Note, In this case the Sons and Brothers of Knights, have greater privilege than the Sons and Brothers of Baronets.

3. The

3. The third Qualification is of certain *Qualification* persons dignified in the Universities; and *by Dignity.* of that sort are all Doctors and Bachelors of Divinity, Doctors and Bachelors of the Canon Laws, which shall be admitted to any of those degrees by any of the Universities of this Realm, and not by Grace only: All which may purchase Licenses or Dispensations, and take, receive and keep two Parsonages, &c. with cure of Souls.

And in this Act there is a Negative Proviso, That Proviso, *That* Proviso to this effect, That no person *above the* or persons to whom any number of Chap- *number shall* lains, or any Chaplain by the provisions *not be advan-* aforesaid is limited, shall in any wise by *ced.* colour of the same provisions advance any Spiritual person or persons above the number to them appointed, to receive or keep any more Benefices with cure of Souls, than is above limited.

There is another Proviso, That the Chap- Proviso, *That* lains so purchasing, taking, receiving and *they must have* keeping Benefices with cure of Souls, as *Testimonials.* aforesaid, shall be bound to have and exhibit, where need shall be, Letters under the Sign and Seal of the King, or other their Lord or Master, testifying whose Roy versus Chaplains they be, or else not to enjoy any *Saveacre. T.* Plurality of Benefices by being such Chap- *28 El. C. B.* lains. Upon this Clause some question has *rot. 1130.* been made, whether a Chaplain can be *Hughes p. 41.* retained within the meaning of this Law *Roy versus* by parol; and it seems he may, so that *Evesque Lin-* they have such Testimonial, when they *coln, & alios.* *T. 31 El Rot.* *725. C. B.* pray

pray their Dispensation ; but the safest way is to have it in Writing, and it must be under Hand and Seal.

Now having shewed what persons are qualified within this Statute, I will in the next place shew how the Clerk, that would have the benefit of his qualification within this Law, ought to proceed in the taking a second Living, so that the first may not be void, which is in this manner :

*How to proceed
in the taking
of a second
Living.*

*It should seem
that the King
might dispense
with a Plura-
lity at Common
Law.*

11 H.4.60.b.
Stat. 25 H. 8.
cap. 21.

The Parson that falls within any of the Qualifications within this Law, which makes him capable of a Plurality, and having obtained a Presentation to a second Living, must carry his Testimonial or Retainer under the Hand and Seal of his Lord or Master, to the Master of the Faculties, who is to make out his Dispensation or Licence to accept the second Benefice ; which being obtained, he must next have it confirmed under the Great Seal of England : And after he hath thus obtained his Dispensation, and has it confirmed under the Great Seal, then, and not before, he is to apply himself to the Bishop of the Diocese where the Living lies, for his Admission and Institution.

But these things taking some time in the doing, I advise the Clerk immediately to enter a Caveat with the Bishop and his Vicar-General, and carry his Presentation to the Bishop, and acquaint him with it, and with the reason of his delay, lest he should be surprized.

Though

Though by the Letter of the Act, the first Living is not void until Induction into the second Living; the words whereof are as follow: [*If the party be Instituted and Inducted in possession of the second Living, that then the first shall be void.*] Yet to avoid the great inconvenience that otherwise would ensue, it has been held that the first Living is void upon the bare Institution into the second Living; and so it should seem the Law was before the making of this Act, where the party had no Dispensation.

First Living void by Institution into the second.

Co. 4. 79. b.
Hob. 166.

And it is to be observed upon this Law, That in case any Lord, or other person, whose Chaplains are qualified within this Law to have two or more Livings incompatible, do retain his full number of Chaplains, and after, one or more above his number; that in that case the Supernumerary Chaplains, that were retained after such Lord, or other person, had retained his full number allowed by the Statute, are not qualified by this Law to have Pluralities of Livings, although the Supernumerary Chaplains be preferred before the other that were first retained.

Which Chaplains shall be qualified, where above the number is retained.
More 361.
Co. 4. 50. a.
& 118. a.
R. versus Eveque Glouc. & Savoy.
Anderson 200.

But if a Chaplain qualified within this Law be legally Inducted into a second Living with a Dispensation, as he ought, although his Master be attainted, degraded, or removed from his Office, yet he shall retain his Plurality during his Life.

Dyer 312.
P. 88.

But

*The Master dies
&c. before
preferment.
Co. 4. 117. b.*

But if one be retained Chaplain to any Lord, or other person, whose Chaplains are qualified within this Law; and his Master dies, is attaint, degraded or displaced before his Chaplain be preferred to a second Living; or if such Lord or other person discharge such a Chaplain, (as he may) in all these cases the Chaplain loses his Qualification to have Plurality of Livings incompatible.

*Co. 4. 118. b.
The Mistress
Marries.*

But if a Dutchesse, Marchioness, Countess or Baroness do retain a Chaplain, and after marries, this shall not take away the Qualification of such a Chaplain, but that he may have Plurality of Livings * incompatible within this Law, as he might have done before.

** That is, having cure of Souls.*

Co. 4. 119. a.

And if such Dutchesse, &c. retains Chaplains, and after Marries, and after becomes a Widow again; yet the first retainer stands good, and was not countermanded by the Marriage or Death of the Husband.

And Note, That there is a *Proviso* in this Act, that though a Dutchesse, Marchioness, Countess or Baroness, do marry an Husband under the degree of a Noble-man or Baron; that yet nevertheless she may retain two Chaplains, which shall be qualified within this Law.

What preferments are not within this Law.

And it is declared by this Act, That Deanaries, Arch-Deaconries, Chancellorships, Treasurerships, Chaunterships, or Prebendaries in any Cathedral or Collegiate Church, or any Parsonage that hath

Vicar endowed, or any Benefice perpetually impropriated, are not to be esteemed benefices with cure of Souls within this Act.

And if any Duke, Lord, or other person, whose Chaplains are qualified within this Law, shall have a double Capacity to qualify his Chaplains; as if a Duke, &c. be made Lord-Warden of the *Cinque Ports*, or Co. 4. 118. 1. Baron, Master of the Rolls, Knight of the Garter, &c. In all these cases such Duke, Baron, &c. can but qualify his number of Chaplains, according to his best Qualification only.

And if the eldest Son of a Duke, Mar-^{Chaplains re-}ques, &c. retain Chaplains in the life time ^{tained in the} of his Father, who after dies, and the Ho- ^{life of the Fa-} nour descends upon such Son; yet this Re- ^{ther.} tainer will not qualify his Chaplains to have ^{Co. 4. 90. 1.} Pluralities within this Statute, because at the time of the Retainer he was not capable to qualify them. *Et quod ab initio non valet, tractu temporis non convalescit.*

If a Duke, Marquess, &c. retain his full ^{Lord discharges} number of Chaplains which are advanced, ^{Chaplains after} and then discharge them; yet he cannot, ^{they are pre-} during their Lives, qualify any other with- ^{ferred.} in this Statute. ^{Co. 4. 90. 2.}

But if a Duke, Marquess, &c. that has ^{A great num-} power within this Act to qualify Chaplains, ^{ber of Chap-} at one instant of time retain his double ^{lains retained} number of Chaplains, or any supernumerary ^{together.} Chaplains; in that case, those only shall ^{Co. 4. 90. 2.} have the benefit of Qualification that are ^{Dyer 312. p. 89.}

D first

first preferred. *Quia in aequali jure melius est conditio possidentis.*

Co. 4. 79. b.
Dyer 312. p. 88.

If one that is qualified within this Statute take a second Living incompatible, and be Instituted or Inducted into the same before he have obtained a Dispensation, the first is void; though *Dyer* makes a *Quære* of it.

This Law is not dispensable.

And note, that it hath been Resolved, That the King himself cannot dispense with this Law. *Dyer* 351. p. 2. 327. 2. p. 4. *Trin. 18 El. C.B. Coxes Case.*

Vaughan's
Rep. 129.
Shure versus
Higden.

If a Parson have a Living under the value of Eight pound, and take another without Dispensation, the first is void; and if he do not read the 39 Articles, or do not do the other things prescribed in the sixth Chapter of the first Book, whereby the second Living is void; yet that helps not, but that the first Living is void, and the Patron may present; but no Lapse will incur until a legal Deprivation and Notice to the Patron.

A Pluralist neglects to subscribe or read the 39 Articles.

Dyer 377. b.
Co. 5. 102. .
Hob. 157. a. .

But if one that is qualified within this Law to have two Livings incompatible, shall neglect at the time of his Institution to subscribe to the 39 Articles of Religion, though he be after inducted into the second Living; yet this shall not make the first void, for his Institution and Induction were both void *ab initio*: But if such Parson had subscribed the Articles at the time of his Institution, and had after neglected to read them within two Months after his Induction into the second Living this makes both Livings

Living void (as was lately adjudged) because for two Months he was compleat Parson of the second Living. Vaughan, 129, &c.

And if a Parson, &c. that is qualified within this Statute to have Plurality of Livings incompatible, be made a Bishop, his Qualification ceases, so that after he cannot take two Benefices incompatible by force of such Qualification; but if he had two Livings before he was made Bishop by qualification and dispensation within this Statute, he may retain them by *Commendam*: And although he were the King's Chaplain, it alters not the case; for by the acceptance of a Bishoprick, he ceases to be the King's Chaplain within this Law. Hob. 157.:

And if a Parson have one Living incompatible, he cannot obtain another with Cure to be united, unless he be qualified and have a Dispensation, but that first will be void. Parsons Law, l. 2. 14. & 15. Uniting a Living is a Plurality.

Mr. Hughes in his *Parsons Law* puts two Cases, which he is of Opinion are out of the danger of this Law. The first is, where there is a Parsonage or Vicarage endowed, and the Parson without Dispensation or Qualification accepts the Vicarage: And he conceives, That notwithstanding that these are two several Advowsons and Benefices, and that several *Quare Impedit*s may be brought of them, and that several Actions are maintainable by the Parson and Vicar concerning their Possessions; that yet nevertheless, the presenting of one person to both is no Plurality within this Statute or

Parson and Vicar of the same Church, Si, &c.

the Canon ; because the Parson and Vicar have both but one cure of Souls. Besides, there is a *Proviso* in the Act, *That no Parsonage with a Vicarage endowed, shall be accounted a Benefice with cure of Souls within that Act.*

*Two Rectories
in one Church.*

But his other Case seems more doubtful, and it is put where a Church has two Rectories, and each has cure of Souls *per se*, and are incompatible, and one person obtains both these Livings without Qualification or Dispensation.

This Case he conceives to be both out of the danger of this Act and the Canon :

1. Because it is not in *pluribus Ecclesiis*.

2. When there are several Advowsons in one Church, neither Parson hath the whole cure of Souls ; and the words of the Statute are, *Having no Benefice with the cure of Souls of the value of Eight pounds, takes and accepts another Benefice with cure of Souls, &c.*

*Cooper versus
Beauchampe.
P. 17. El C. B.*

But here the Church is one and the same, and the cure of Souls the same ; and therefore, as he conceives, neither within the danger of the Statute or Canon : But in a private Report that I have, this very point came in question in the latter end of the Queens time ; and the Reporter says, That *Walmesly* and *Beaumont* were of Opinion that this Case was within the Statute : But *Anderson* doubted, and seemed to incline to the contrary. *Ideo quære inde.*

By the Resolutions of the several Cases fore-mentioned it is worth observation, how the Judges of the Common Law have endeavoured to advance this Law, and retain the Qualifications: And yet when all is done, this Law produces little more effect, than the transferring the power of Dispensations in this case from the Pope, and scattering it amongst the Nobility and others: And how many Pluralists are there in England, that hardly see either of their Livings in a year? So that generally the best Livings in the Kingdom are served with poor Curates, and no Hospitality kept: A thing worth the Consideration of a Parliament.

There is now a Thousand Qualifications at least in England by Service, besides the Chaplains of the King, Queen, Princes of the Blood, and Dowagers, and probably as many more by Birth and Dignities; and

there are about Four thousand three hundred Livings in England of Ten pound per Annum in the King's Books, and upwards; and it is not the least Livings the Pluralists catch at, though at first they crept into the Church where the Livings were so small they were not able to maintain a Minister; and, if the 41 Canon of King James were observed, many Mischiefs in this case might be prevented. Co. 2 Inst. 627.

And it is to be hoped, that our Noble Lords, when they consider the great damage the Church suffers by Pluralities; the many poor Souls that are neglected, in danger to perish; the great discouragement it is to learned Men, when they see many of meaner worth enjoy two Livings apiece; besides Prebends, Deanries, *Sine Cura's*, &c. and the abler and better Man, for want of Friends, is never able to rise higher than a poor Curacy of Twenty or Thirty pounds a year, when they consider how great a scandal it is to our Church; and it is to be feared, attended with a Curse: I say, It is

The Lord Chancellor Ellesmere at the Conference at Hampton Court, affirmed, He never gave any of the Kings Livings to Pluralists. A worthy President. Fuller's Eccles. Hist. lib. 10. p. 16.

to be hoped, Their Lordships will become so much Self-deniers, as to lay down this Privilege where they received it, certainly a Blessing and the Prayers of the poor Clergy would attend it, and if Advantage should be reckoned in the case, I know none their Lordships enjoy by it : For I am bound to say that for their Lordships Honour, That I do not know a Lord within the compass of my knowledge, that keeps a Beneficed Clerk for his Domestick Chaplain, but have Chaplains of their own, and allow them honourable Stipends and Preferments in due time ; but if their Lordships should not be willing to lay aside this Privilege, the Archbishops that have the power of Dispensation, might remedy it in part, or in all ; or his Sacred Majesty, in denying Confirmation. God grant all may be done for the good of the Church.

The Archbishop can refuse no person a Dispensation without just and reasonable Cause. See the Penalties against him, and Remedy for the Party grieved, *Stat. 25 H. 8. c. 21. §. 17.*

C H A P. V.

What Simony is, and who who shall be said to be guilty of it, and what are the dangers ensuing thereupon.

HAVING shewed my Clerk how to obtain a Benefice, and likewise those which are qualified, how to take a second Living; it rests, that I should shew them what is to be done after Induction, to confirm them in their Benefices: But because *Simony* is not only scandalous to the Clerk that is guilty of it, but also very dangerous; and I told my Clerk in the Second Chapter, That he must obtain his Presentation without any corrupt or Simoniackal Contract; I thought it fit by the way to let my Clerk know, not only what *Simony* is, but likewise the danger that attends it.

Simony, by the Canonists and Schoolmen, *What Simony* is defined to be, *Studiosa voluntas emendi vel* is. Panormit. *vendendi aliquid spirituale aut spirituali annexum opere subsecuto.* c. Nemo extra eo, &c.

Chaucer, 109.

And *Thomas Aquinas* says, *Quod Simonia* 2. *dici videtur à Simone Mago, qui donum Spiritus sancti emere voluit, ut ex venditione Signorum quæ per eum fierent multiplicatam pecuniam lucraretur; & sic illi qui spiritualia vendunt, conformantur Simoni Mago in intentione,* Tho. Aq. 2o. 2a. q. 100. Art. 1. Cro. El. 789. Tho. Aq. ibid. Art. 4.

Hoveden in his
History of H 2.
mentions a Ca-
non made by
Richard, Arch-
bishop of Can-
terbury, that
the Patron
that presents by
Simony should
lose his Ad-
vowson for
ever. Speed
505.a.
In Regist.hab.
1.q.1a. Canon,
Quicumque.

Ibid. Canon.
Presbyter.
It hath been
held, That a
Patron that
presents by Si-
mony, should
lose his Patre-
nage for ever.
Hoveden. H 2.
p 310.
Speed 505 a.
Ad. Apost. c. 8.
v. 21, &c.

Division.

Canons against
Simony.

in actu vero illi qui emere volunt: Illi autem qui vendunt in actu imitantur Giezi discipulum Helisæi, de quo legitur 4 Reg. c. 5. quod accepit pecuniam à leproso mundato, unde venditores Spiritualium possunt dici, non solum Simoniaci, sed etiam Giezatæ.

And St. Gregory says, *Quicumque sacros ordines vendunt aut emunt, Sacerdotes esse non possunt, ut scriptum est. Anathema danti, Anathema accipienti, hæc est Simoniaca hæresis: Quomodo ergo, si anathematizati sunt, & sancti non sunt, sanctificare alios possunt? Et cum in Christi corpore non sunt, quomodo Christi corpus tradere vel accipere possunt? Qui maledictus, benedicere quomodo potest? And the same holy Father further says, Si Presbyter per pecuniam Ecclesiam obtinuerit, non solum Ecclesia privetur, sed etiam Sacerdotii honore spoliatur.*

And it appears clearly, That the very Intention to buy Spiritual Gifts or Preferments, carries with it the guilt of Simony, as well as the act it self: And therefore the holy Apostle said to Simon Magus, *Cor enim tuum non est rectum coram Deo; pœnitentiam itaque age ab hac nequitia tua, & roga Deum si forte remittatur tibi hæc cogitatio cordis tui.* But this is in foro conscientie only, and not punishable by any human Laws, unless it proceed to the Act.

Simony by the Canonist is distinguished into *Simoniace* & *Simoniacus*: The first is where the Clerk comes in by Simony, whereunto he is not party or privy: *Simoniacus* is he which obtains a Spiritual Preferment by

a Corrupt and Simoniack Contract, to which he is party or privy, and consenting.

Selling of Tithes is called Simony in some Passages of Popes about *An.Dom.* 1095. *Selden de Dec.* 135.

Against this Corruption in the Church many Church Canons have been made, amongst which I shall instance only two, and those Provincial ones of our own Nation.

The first was made in the time of Henry the Second, by Richard Archbishop of Canterbury, and is as follows: Vide Hoveden P. 310.

Nulli liceat Ecclesiam nomine dotalitatis ad aliquem transferre, vel pro presentatione aliquus personæ pecuniam vel aliquid aliud emolumentum pacto interveniente recipere: Quod si quis fecerit, & in jure convictus vel confessus fuerit, ipsum tam Regia quam nostra freti auctoritate patronatu ejusdem Ecclesiæ in perpetuum privari statuimus. Lindw.c. Nulli
Liceat Eccle-
siam, &c.
fol. 152. a.
Vide the Ap-
pendix 1. to
this Chapter.
Vide Stillingfl.
Eccles. Cases,
pag. 85.
Lindw. 77. a.
152. a. But it was not sufficient by a Canon, to deprive a man of his Freehold or Inheritance, be the word in *perpetuum* taken for life, or for ever, as it imports; neither was this Canon ever put in execution, or attempted so to be, that I find.

The other Canon I made mention of, I find among the Canons of Othobonus, the Pop's Legate here in England; which is to this effect: Cap. Quia
plerumque.

Quia plerumque; evenire didicimus, quod, cum ad vacantem Ecclesiam fuit presentatio facienda, is qui presentandus est prius cum Patrono de certa Summa de bonis Ecclesiæ sibi annuatim solvenda paciscitur, & sic pactus ad Ecclesiam præ-

presentatur. §. Nos huic actui tam Simoniacum vitium quam Ecclesiae dispendium ingerenti occurrere intendentes, universas promissiones & pactiones hujusmodi penitus revocamus, & eas imposterum fieri districtius imbibemus: Et si facti fuerint, vires aliquas decernimus non habere.

But this Canon was of as little effect as the other, as to the making the Contracts void, which were only determinable at the Common Law, where this Canon could not be pleaded in Bar.

Cro.El. 788.

789.

Per Warburton.

I have mentioned these two Canons, not for the validity or use so much, as to satisfy the Reader what Provincial Canons we have against Simony, and to how little effect they were before the Statute of 31 Eliz.

* Per Bullam Sixtinam privatam ipso facto de omnibus dignitatibus, beneficiis, officiis, & efficiatur inhabilis ad omnia.

3 Inst. 154.

Tho.Aq. 20 2^a.

q. 106. Art. 1.

Sec. 2.

S. Aug. de hæresibus in principio.

S. Greg. in Reg. hab. 1. q. 1, &c.

d. 1.

But there were some General Canons of the Church of greater force, whereby *Simoniace* is punished by Deprivation, and *Simoniacus*, by Deprivation and perpetual Disability*, not only as to the Church he was presented to upon a Simoniacal Contract, but also to all others: And being *Malum in se*, it is not dispensable either by the King or any other. *Stillingfl. Eccl. Cases*, 85. *Rob. 1. Rep.* 237.

And it has been held by some of the Fathers to be a Heresy, if not the Sin against the Holy Ghost: But neither the greatness of the Sin, nor the severity of the Canons, were sufficient to restrain this Evil in the Church, till the Parliament of *England* took it into their care, and in the 31 of *Eliz.* it was Enacted:

1. That

1. That if any person or persons, for any Sum of Money, Reward, Gift, profit or benefit, directly or indirectly, or for or by reason of any Promise, Agreement, Grant, Bond, Covenant, or other Assurance for any Sum of Money, Reward, Gift, profit or benefit whatsoever, directly or indirectly, shall * present or † collate any person to any Benefice with Cure of Souls, Dignity, Prebend, or Living Ecclesiastical, &c. or ‡ give or bestow the same for or in respect of any such corrupt Cause or Consideration, that then every such Presentation, Collation, Gift and Bestowing, and every Admission, * Inve-
Stat. 31 El. 6. Statute against Simony.
* Relates to Patrons.
† This is to Bishops.
‡ Donatives.
* Bishops.
 stitute and Induction thereupon shall be utterly void, &c.

And that the Queen, her Heirs and Successors, to present, collate, &c. for that one Turn only.

And that every Parson, &c. that shall give or take any such Sum of Money, &c. or that shall take or make any such Promise, &c. shall forfeit and lose the double value of one years profit of every such Benefice. And the person so corruptly taking any such Benefice, shall thereupon and from thenceforth be adjudged a disabled person in Law, to have and enjoy the same Benefice, &c. Penalty.

2. And further, That if any person shall for any Sum of Money, Reward, &c. (ut supra) directly or indirectly (other than for small and lawful Fees) or for or by reason of any Promise, &c. admit, institute, install, induct, invest, or place any person in or to any Benefice with Cure, &c. That then every person so offending shall forfeit and lose the double value of one years.
Against precipitate Admission or Institution, &c.

years profit of such Benefice, &c. and that the said Benefice, &c. shall be eversoone void, &c. And that the Patron or person to whom the Advowson, &c. shall and may by virtue of this Act, present or collate, &c. as if the person were naturally dead; but no Lapse hereby to incur till six Months after Notice.

Against corrupt Resignations and Exchanges.

3. And if any Incumbent of any Benefice with Cure of Souls, do or shall corruptly resign or exchange the same, or corruptly take for or in respect of the resigning or exchanging of the same, directly or indirectly, any Pension, Sum of Money, or benefit whatsoever; That then the Giver and Taker of any such Sum, &c. corruptly, shall lose double the value of the Sum so given, taken or had; the one half to the Queen, &c. and the other moiety to him that will sue for the same, &c. in any of her Majesties Courts of Record, in which no Essoign, &c.

Ecclesiastical Censures saved.

4. Provided, That this Act shall not restrain any Censures Ecclesiastical, &c.

Simony in Ordaining and giving Orders to Preach.

5. And further it is provided, That if any person shall receive or take any Money, Fee, Reward, or any other profit directly or indirectly; or shall take any Promise, Agreement, Covenant, Bond, or other Assurance, to receive or have any Money, Fee, &c. directly or indirectly, to him or themselves, or any of their, &c. Friends (all lawful and ordinary Fees excepted) for or to procure the ordaining or making of any Minister, &c. giving any Order and License to Preach, shall lose Forty pounds; and the Minister so made, Ten pounds.

And

And that if such Minister within seven years next after such corrupt entring into the Ministry, &c. shall except or take any Benefice, Living, or Promotion Ecclesiastical, the same Living, after Induction, &c. to be void.

And that the Patron may present, &c. as if the party so Inducted were naturally dead; the one half of the said Forfeitures to be to the Queen, &c. and the other half to the Informer, to be recovered, (ut supra)

And I do not observe, that the corrupt *Canons against* Patrons were in danger to suffer by any *Law.* Law or Canon before this Law was made: For, as I said before, his Right could not be taken away by a meer Canon not confirmed by Parliament; and before this Law was made, the Incumbent that came in by Simony held the Living which he obtained by Simony, until he was legally and judicially deprived by Sentence Ecclesiastical, wherein he often escaped for want of such Proof as the Spiritual Law required: But this Statute strikes at the Root, and makes as well the Presentation, as the Admission, Institution and Induction, void. So that if this Statute had not given the Presentation to the Queen, the true Patron might have *Hob. 167.* presented a new Clerk; or in his default the Church would have lapsed.

But by this Act the corrupt Patron does not only lose the Presentation to the King *pro hac vice*, but also two years value of the Church; not according to the valuation in *3 Inst. 134.* the King's Books in the *First-fruit* Office, but according

according to the true and utmost value of the Church.

3 Inst. 153:

But if one that has no right to present shall, by means of a corrupt and Simoniack Agreement present a Clerk, who is by his presentation Admitted, Instituted and Inducted into a Church; yet this shall not entitle the King to present: For though the Act of Parliament makes all void, yet an Usurper cannot forfeit the right of another in whom there is no fault.

Co. 12. 74.

Note, That the Patron shall lose his presentation within this Law, although the Clerk be not privy to the corrupt Contract.

And it seems by the penning of this Act, that the forfeiture of the double value of the Church is incurred by the corrupt Contract only; but the Presentation is not forfeited to the King, unless the Clerk *de facto* presented or collated upon such corrupt Contract.

Clerk not privy to the Simony.

And it matters not whether the Incumbent, that comes in by Simoniack Contract, were privy thereunto or not, as to making the Church void.

How the Canon Law stands in this Case, see Gratian. Causa 1. q. 4. & Gregorius Decretals de Simonia. 1619.

But the greater Question is, Whether the Clerk that is presented upon a Simoniack Contract, to which he is neither party nor privy, be disabled for that Turn, to be presented by the King to that Church?

I have seen the Report of a Case in the latter end of the Reign of King *James*, where it was adjudged, That if a Clerk were presented upon a Simoniackal Contract, to which he was not party or privy, that yet notwithstanding it was a perpetual Disability upon that Clerk, as to that Living.

Fowler versus
Laphorn.
P. 17 Jac. B.R.

And in the Case of *Baker and Rogers*, *Cro. El. 783; M. 42 & 43 El. B.R.* The Case was, *Baker* agreed, the Church being void, to give the Patron 180 *l.* for the Presentation, who presented his Brother, who knew nothing of the corrupt Contract till after Induction. And though it was clear, that the Grant of the Presentation during the Vacancy was merely void, and that *Baker* presented as an Usurper; that yet notwithstanding the Clerk was in by the corrupt Contract; because it was not to be intended, that the Patron would have suffered the Usurpation, had it not been for the corrupt Contract: And there it should seem by Mr. Justice *Warburton*, that the Clerk was disabled *quoad* *hanc*.

And in a Cause between the King and the Bishop of *Norwich*, *Cole and Sair*, Sir *George Crook*, who was a Counsel in the Cause, reports, That Sir *Edward Coke* affirmed it had been adjudged, That if a Church be void, and a Stranger contracts for a Sum of Money to present one who is not privy to the Agreement, that notwithstanding the Incumbent coming in by the Simoniackal Contract, is a person disabled to enjoy that Benefice, although he obtain a new

Cro. Jac. 385.
Bullst 3.92.

new Presentation from the King; for the Statute, as to that Living, has disabled him during Life.

I must acknowledge, if the Law be so taken, it is very severe.

3 Inst. 154.

But let us hear Sir *Ed. Coke* himself speak, and he in his Coment upon this Statute says, That it was Adjudged in the before-mentioned Case of *Baker and Rogers*, That where the Presentee is not privy nor consenting to any such corrupt Contract, as is forbidden by this Statute, (because it is no Simony in him,) there the Presentee shall not be Adjudged a disabled person within this Act: For the words of the Statute are, [*And the person so corruptly giving;*] so as he shall not be disabled, unless he be privy to the Contract: And so (says he there) it was Resolved, *M. 13 Jac.*

Co. 12. 101.

3 Inst. 154.

And Sir *Edward Coke*, in that Book that goes under the Name of his *Twelfth Report*, and without doubt was his own, Reports, That it was so Adjudged in the Case of *Dr. Hutchinson*, Parson of *Kenne* in *Devonshire*, by the whole Court, That if a Clerk be presented upon a corrupt Contract within this Statute, although the Clerk be not privy thereunto, yet the Presentation, Admission and Induction are all void within the Letter of the Statute: For the Law intendeth to inflict punishment upon the Patron, being the Author of this Corruption, by the loss of his Presentation; and upon the Incumbent, who came in by such a corrupt Patron, by the loss of his Living, although

Although he never knew of the corrupt Contract; but if the Presentee were not cognizant of the Corruption, then he's not within the Clause of Disability within the same Statute; and so (says he) was the Opinion of all the Judges of *Serjeants-Inn in Fleetstreet, M. 8 Jac.*

And it seems to me upon the penning of the Statute, that this Opinion is more rational than the former; for the words of the Statute are, *That the persons so corruptly taking, procuring, seeking or accepting, shall, &c. from henceforth be adjudged a disabled person in Law, to have or enjoy, &c.* And though the Incumbent in this case take and accept the Benefice upon the corrupt Contract, yet as to him it is not corruptly taking.

It should seem that by the Canon Law one that is Simoniack promoted, may upon a voluntary resignation be dispensed with to have the same Living again.

Greg. Decret. de translatione Episcop. tit. 7. & lib 5. tit. 3. cap. 26.

And that this agrees with the Canon Law, St. Gregory's Decretals, Lib. 1. Tit. 7. cap. 59. p. 210. *si alicujus*; where the Gloss puts the case, *Aliquis est in Prelatum alicujus Ecclesie electus per Simoniam eo tamen ignorante nec ratum habente: Talis electio propterea reprobata est, Queritur utrum Episcopus, cum illo poterit dispensare ut iterum ad eandem Prelaturam Elegatur. Respondetur, quod Episcopus illa vice cum illo dispensare non potest, sed cum illo qui ignoranter simplex beneficium per Simoniam est adeptus post liberam resignationem potest Episcopus dispensare.* So that it seems the Canon Law makes a difference, where the Incumbent voluntarily resigns, and where he is deprived.

But this being a Point thus controverted, *Quare.* I shall not take upon me to determine, but leave it to the Judgment of the more Learned.

*What Contract
shall be said
Simoniack.*

Hill. 16 Jac.
rot. 667. C.B.

More 916.
Cro. El. 685.
Smith versus
Shelburne.

Winch 63.
Sheldon versus
Brett.

Hob. 165.

I shall in the next place shew, What Contracts have been held Simoniack within the meaning of this Law.

In a cause between Dr. *Graunt* and one *Bowden*, it was held (upon an Evidence to a Jury,) That where two Parsons agreed to change their Livings, and the one promised his Patron, that if he would present the other with whom he was to exchange, that he should make the Patron a Lease of his Tythes at such a Rent; and this was held Simony, although the other was not privy to the Contract, he making the Lease after.

The Father in the presence of his Son, being a Clerk, purchased the next Advowson of a Church, the present Incumbent of the Church being sick, and not likely to live, who soon after died, and he presented his Son; and this was held Simony within this Statute: But if this had been done in the absence of his Son, it had not been Simony, because the Father is bound to provide for his Son. *Quære* of the difference.

And by *Hutton* it was held Simony to purchase the next Advowson, the Incumbent being sick.

In the Case of one *Winchcombe* against the Bishop of *Winchester* and *Puleston*, the Case was, One *Say* bargained with the Patron (the Incumbent being sick) for Ninety pounds to present him when the Church should be void, and for the better assurance took a Grant of the next Avoidance to

Friends

Friends in Trust : The Incumbent died, and was presented ; and this was held Simony within this Law.

To sell an Advowson *ea intentione* that *J.* shall be presented is Simony, 2 *Ventr.* 39.

There is of late time a practice introduced by corrupt Patrons, that, if not nipt early in the budding, will make this good Law of no effect ; I mean the taking Bonds for Resignation. And this practice took its rise from two Cases in Sir George Crooke's Reports.

The first was between *Jones* and *Lau-* Cro. Jac. 248.
rence, 8 *Jac.* The Case was thus : *Jones* 274.

had a Son which he intended to be a Clergyman, and having obtained a Presentation from Queen *Elizabeth* for the Church of *Streetham*, agreed with the Defendant that he should be presented, so that he would resign when *Jones's* Son was qualified for the Living ; whereupon the Defendant entered into a Bond of a thousand Marks payable to the Plaintiff upon this condition, (having first recited the Agreement) That if the Defendant within three Months after request should absolutely resign his said Benefice, that then, &c.

And in an Action of Debt brought upon this Bond, the Defendant pleaded *Non requisivit*, which was found against him ; and in Arrest of Judgment it was moved, That this Bond was made for the performance of a Simoniacal Contract, and therefore void ; but notwithstanding the Court gave Judgment for the Plaintiff : And two Reasons are given for the Judgment ; The first was, because there was no averment of the

Cro. ubi supra.

Simony ; the second, that it was not material as to the Bond, because that Statute did not make the Bond or Contract void, but only the Presentation, &c. for this I clearly infer from the conclusion of the case.

But I confess the sense of the Court was That in truth, if a Man be preparing a Son for the Clergy, and have a Living in his disposal, which falls void before his Son be ready, he may lawfully take a Bond of such person as he shall present, to Resign, when his Son is become capable of such Living. And I have nothing to say against that Opinion, but it is very just and reasonable Nature obliging that every one should take care for his Posterity.

But if a Patron take a Bond absolutely to Resign upon request, without any such cause as the preferment of a Son, or to avoid Pluralities, or Non-residence, or such reasonable cause, but only to a corrupt end and purpose to exact Money by this Bond from the Incumbent, or attempt it, though perhaps the Bond may be good against the person that entered into it : Yet I am clear of Opinion, for my own part, that the said Bond makes the Church void, and gives the Presentation to the King ; and it should seem in *Jones* and *Laurence's* Case, That if Simony had been averred, it would have been left to a Jury to have adjudged what the intention of the corrupt Patron was.

The other Case upon which these subtil Simonists build, was between *Babington* and *Wood*, 5 Car. 1. B. R. where the Case was likewise in Debt upon an Obligation with a

Con-

Condition, That whereas the Plaintiff intended to present the Defendant to such a living, that if the Defendant upon request after his Admission should resign, that then the Bond to be void, &c.

Upon Oyer of this Bond and Condition, the Defendant demurred, and Judgment was given for the Plaintiff: But all the Court conceived, That if the Defendant had averred, that the Obligation had been made, with intent to exact Money, make a Lease, &c. which in it self had been Simony, then upon such a Plea peradventure it might have appeared to have been Simony; and then it might have been a Question, whether the Bond had been good or no? But upon this Demurrer it did not appear there was any Simoniackal Contract; and such a Bond might be made upon a good and lawful design, as the preferment of a Son, as in *Jones and Laurence's* case before, to avoid Non-residence, Pluralities, &c.

So that it appears by both these Cases, That Bonds taken upon prudent and just ends to Resign, are not Simoniackal; but where such Bonds are taken upon corrupt designs, and it be made appear by any subsequent practice or action, it is clearly Simony, as if the Bond had been expressly to pay Money; for what difference is there between a Bond expressly to pay Money, and a bond to Resign, which is to pay Money, if the Patron say, *Either pay me so much Money, or Resign*; when all the World knows, in such a Case, the Parson must pay the Money, or Resign and be undone?

And the World shall never perswade me That those Reverend Judges that gave these Judgments ever intended further : And I hope that the Reverend Judges, that now supply their places, will discountenance and discourage such practices that tend so much to the ruin of the Church and Religion ; for I know no Law that tends more to the advancement of Learned and Religious Men than this Law doth, and therefore ought to have a benign construction to the end it was designed.

Noy 22. T. 15.
Jac. rot. 1051.
C. B.

* Vis infra in
the Catalogue
of Law Books.
Stillingsfleet's
Bonds of Re-
signac'. 81.

I find a Case reported, I cannot say that it is by an * Authentick hand, but such as it is, I will give it the Reader ; it was between Sir *John Pascal* and one *Clerk*, in the 15th. year of King *James*, upon Evidence to a Jury it was held, that such a Bond was Simoniacal ; but the Circumstances not appearing in the Book, the Case can be of no great Authority.

But before I shake hands with these Bonds of Resignation, it will be convenient I give my young Clergy-man some Cautions against them : For it is an old Saying, *The Resetter is worse than the Thief ; for without Resettlers there would be few Thieves.* And,

Advice against
Bonds for Re-
signation.

1. I hold it a great disreputation for any Clergy-man to give any such Bond, which may have the least tincture of Simony ; nor do I believe any man of worth will do it, unless it be upon such Reasons as aforesaid.

2. If

2. If such Bond carry with it a Simoniacal corrupt design, it makes the Clerk no less guilty of Simony than the corrupt Patron; and then the Clerk not only loses his Living by this Statute, but is for ever incapacitated to have it by any future Presentation, and by the Canon Law is to be degraded and incapacitated to all other, C.I. q. 1. *Presbyter* &c.

Concil. Remens.
si quis vendide-
rit. 3 Inst. 153.
Margine Noy
72.

Lastly, If he do not Resign upon request, he is subject to the whole penalty of the Bond; for Simoniacal Bonds, Contracts, &c. are not made void by this Act, but only the Presentment, &c. And so you may observe a difference between *malum in se*, and *malum prohibitum*, by the Statute.

These Bonds for Resignation are become so frequent, that hardly a Living passes, unless by Persons of Honour, without them, and very ill use is made of them.

There's a poor Vicar in my Neighbourhood that has a Vicarage but of 40 *l. per Annum*, and was forc'd into one of these Bonds to obtain it, and his Patron takes from him Tythes of half the Value of the Church, and he dares not Question him for them; *Opus est medico*. It is time for the Clergy to prefer a Bill in Parliament, not only to make all such Bonds void; but likewise all Bonds, Bills, Covenants, Promises, Judgments, Statutes and Recognizances, made or entred into upon any Simoniacal Contract. Certainly no good man would oppose it; a fit undertaking for my Lords the Bishops.

What Cove-
nants and A-
greements are
within this
Law.

Gro. Car. 425.

It is now to be considered, What Cove-
nants or Agreements shall be said to be Si-
moniacal within this Law.

If a Father-in-Law, upon the marriage
of his Daughter, covenant with his Son-in-
Law without any Consideration, but volun-
tarily, That when such a Church falls void,
which is in his gift, that he will present him
to it; this is no Simony within this Law:
But it should seem, that such Covenant in
Consideration of Marriage, or any other
Consideration had, made it Simoniackal.

Noy 142.
Baker versus.
Mountford.

So where the Patron took a Bond from
the Presentee to pay 10 l. yearly towards
maintenance of his Predecessor's Son, whilst
he remained in the University unpreferred,
was held no Simony: And in that case it
was said by *Foster* Justice, that it was Ad-
judged in the Earl of *Suffex's* Case, where
the Patron took a Bond of the Incumbent
to pay 5 l. *per Annum* to the Widow of his
Predecessor, it was no Simony: These were
good Charitable Resolutions; *sed quare
rationem inde.* And *Foster* said, That not-
withstanding great opposition in that case,
the Parson enjoyed the Living at that
time.

3 Inst. 155.

In the next place it will be fit to consider,
what Church Preferments are within this
Law; the Statute only names Benefices with
cure of Souls, Dignities in the Church, Pre-
bends and Livings Ecclesiastical. The word
Benefices with cure of Souls, seems chiefly
aimed at Parsons and Vicars in Churches
Parochial: Dignities comprehend Arch-
bishops,

bishops, Bishops, Archdeacons, Deans, Chan-
cellors, Treasurers, Chanters, Precantors,
Officials, &c. For Dignities Ecclesiastical are
defined by the *Civilians* to be, *Administratio*
cum Jurisdictione aliqua conjuncta.

Lindwood.
cap. ut Clericali
verb. dignit.
Duarinus de
sacris Ecclef.

Ministr. & Be-
neficiis li. 2. c. 6.

And Lindwood tells us, *Dignitas cognoscitur*
altero de tribus modis, primo quando beneficium
habet administrationem rerum Ecclesiasticarum
cum Jurisdictione: Secundo ex eo quod habet
nomen dignitatis cum prærogativa in choro &
capitulo: Tertio quando constitutio vel consue-
tudo Ecclesiæ habet, quod beneficium habeatur &
reputetur pro dignitate.

Lindw. cap. Esu-
rientes avari-
tæ verb. Digi-
nitate.

And in another place speaking of Digni-
ties, he says, *Proprie loquendo de dignitate ordo*
Episcopalis dicitur dignitas; sic Abbates, Priores
conventuales, & officiales Episcopi, dicuntur
dignitates, & in inferioribus Episcopo jus non
imponit nomen dignitatis, nisi Archidiaconi &
Archipresbyteris, propter Jurisdictionem, & præ-
eminentiam, quas habent super alios: Imo licet
(says he) Archidiaconi nullam haberent Juris-
isdictionem ex consuetudine, tamen ratione nominis
sonat in dignitatem, &c.

Cap. ut Cleri-
calis verb. Digi-
nitate.
But for Autho-
rities at Com-
mon Law which
shall be Digni-
ties.

See 27 H. 6. 5.
25 E. 3. 41.
Br. nosme 25.
17 E. 3. 31.
11 H. 4. 40.

Prebends are particularly named, and
Livings Ecclesiastical are words of a large
extent, and draw in Donatives within the
penalty of this Law, as hath been adjudged,
though they have no cure of Souls.

14 H. 6. 14.
27 H. 6. 3.
27 H. 8. 10.
Fletcher versus
Machaller,
T. 7. Car. I. B. R.

Having held the Reader something long
in my Discourse upon the matters relating
to the first Paragraph of this Statute, I shall,
after some general Observations upon it,
draw to a Conclusion.

And

Who may take
advantage of
Simony, quod
nota.

Sir Jo. Rowfe
versus Wright.
P. 17 Jac. Hob.
167, 168, 177.

Contract not
executed.

Hob. 167.

Simonist dies
possessed, if the
King lose the
Turn.
Hob. 166.

And first it is to be observed, That where any Clerk is in by Simony, or any other dignified person, every Stranger as well as the King, may take advantage of it : And therefore if the Parson, Vicar, or other dignified Person, shall bring any Action for the Tythes, or other things belonging to his Church ; the Defendant may avoid the Action, by proving that the Plaintiff obtained his preferment by a Simoniackal Contract.

Note, in Case of Simony, the Presentation vests in the King without Office, 2 Vent. 213.

And Note, That a Simoniackal Contract, where the party is not presented in pursuance of it, is not within the penalty of this Law ; but it should seem, That if one that has no Right present a Clerk upon a Simoniackal Contract, he is within the penalty, though an Usurper ; but not, as hath been said, to give the King the Presentation.

It hath been a Question, If the Clerk which comes in by Simony die in possession of the Church, Whether the King should lose his Presentation ? But it hath been Resolved, that he shall not ; for the Statute makes the Presentation, Admission, Institution, and all void ; so that the Church was never full of an Incumbent, & *nullum tempus occurrit Regi*. But if the King suffer an Usurpation by the Patron, or any other, presenting another Clerk, who is Instituted and Inducted, and after dies Incumbent, in such case the King loses his Presentment ; and so it should seem, if the Incumbent resign, or be deprived, the Church having been once full.

And

And note, There may be a Simony, and neither Patron nor Clerk consent or be privy to it; and yet the Church for that Turn is by Statute given to the King: If the Clerk be presented by the means of such corrupt Contract, though neither Patron nor Clerk were privy or consenting to it; so the King, though he himself cannot be guilty of Simony, may present upon a Simoniackal Contract between others, and such Presentation is void by this Act.

Simony, and Patron and Clerk free. Bath versus Porter, P. 7. Jac. B.R.

Suppose a Clerk be presented upon a Simoniackal Contract, and then the King or Parliament, that is, the King in Parliament, with the Assent of his Lords and Commons, pardons all Simony by express or general words, though this may pardon the Penalties, yet the Church remains void.

Pardon of Simony the effect. Lea. vers. Smith, M. 40 & 41 El. C. B. contra.

Hob. 167.

I shall now conclude this Paragraph with the saying of a holy Father of the Church, viz. St. Ambrose upon this Subject; *Cum ordinaretur Episcopus, quid dedit? Aurum fuit: Quid perdidit? Anima sua fuit: Cum alium ordinaret, quid accepit? Aurum fuit: Quid dedit? Lepra fuit.*

De ministerijs & hab. 1. q. 1. Canon cum Ordinar.

I am now come to the second Paragraph of this Statute, which Sir Edw. Coke (who was a Member of this Parliament) tells us, was added to avoid hasty and precipitate Admissions, Institutions, and Inductions, &c. to the prejudice of those that have right to present, and thereby putting them to their Actions to recover their Rights, and there are seldom Bribes (as I may say) in this case given,

4 Inst. 135. The reason of the Paragraph against precipitate Admissions.

given, where the Patron has a good and sure Title.

The taking or giving above the usual Fees in this Case, is as well dangerous to the Clerk as the Officer ; for the Church shall be void, so that the Patron that has right to present, may present again ; and the Usurper and Officer that takes more than his Fees for such expedition, forfeits double the value of the Benefice for a year, not according to the rate in the *First-fruits* Office, but according to the very true value : But upon this Clause no disability rests upon the Incumbent, but that he may by the true Patron be presented again ; nor Lapse, till after six months from the time of Notice, given by the Bishop, &c.

When the Church shall be void.

And observe the Penning of this Clause : It is not that the Church shall be *ipso facto* void, or that the Institution, &c. should be void ; but that it should be *estsoons* void, and that the Patron shall present, as if the person were naturally dead : So that it should seem the Church is once full by this Institution and Induction ; and hence there may some doubts arise, Whether the Church shall be void *ipso facto*, or whether it must be avoided by Ecclesiastical Sentence of Deprivation. But it seems to me, That the Patron may present immediately, without any Sentence Ecclesiastical.

Resignation and Exchanges Simoniacal.

3. The third Paragraph of this Statute is made against such as shall corruptly for Money, Pension, or other benefit, resign or exchange their Livings with any other :

In

In that case, as well the Giver as the Taker forfeits double the Sum of Money, &c. given and received; but this Clause works no Avoidance or Disability in the person that is guilty.

The fourth Paragraph preserves the Ecclesiastical Jurisdiction, that they may proceed Judicially to censure the Parties for their Corruption in buying and selling Church Preferments: Wherein, as should seem, the Ecclesiastical Laws in some Circumstances are more severe than this Statute; for by that Law, as I take it, he that is convicted of Simony, is after incapacitated not only to that Living, but to all other Church Preferments: But of this be informed by the Canonist.

The Ecclesiastical Jurisdiction saved.

Cro. El. 788, 789.

But I know no Reason, why those corrupt Patrons that take Bonds for Resignation without any reasonable cause apparent, may not be called to an account before the Ordinary, and punished by Ecclesiastical Censures, if it appear they were taken to any corrupt end, or if afterwards he shall endeavour to exact Money by colour of any such Bonds.

I am now come to the last Paragraph of this Statute, which is also a two-edged Law, that punishes as well the Giver as Taker of greater Fee or Reward, than the ordinary and just Fees for, or for procuring any person to be ordained or made a Minister, or giving any Order or Licence to Preach, &c. but this is more severe upon the Clergyman, than the Officer: For the Officer only forfeits

Corrupt giving Orders and Licences to preach.

forfeits forty shillings, but the Clergy-man forfeits ten pounds, and all the Livings he shall take within seven years are made void by this Law after Induction; so that for seven years an Incapacity lies upon the Clerk: How careful ought Clergy-men to be, what Fees they give for their Orders? And note the manner of the penning of this Paragraph, That the Church shall not be void till after Induction.

The first Paragraph makes the Presentation, Institution and Induction, and all void: So that the Church in that case is never full.

The second Paragraph makes it void, not till after the corrupt Admission, Institution, Installation, Induction, Investiture or Placing; and this not till after Induction; by which means the Grantee of the next Avoidance that presents such Clerks, cannot present again: And so it is where the Patrons present by Turn, the presenting such a Clerk will satisfy a Turn, if Inducted.

Co. 5 102 a.

How the Forfeitures are to be recovered.

Gregory's case, Co. 6. 20.

Dyer 236.

Cro. Eliz. 737.

Cro. Car. 112, 146.

Mo. 421. contr.

Co. 12. 99.

4 Inst. 164.

Hales Pl. of the Crown 161.

Lastly, Observe all pecuniary Forfeitures and Penalties within this Statute are given the King and Informer, and are to be recovered by Bill, Plaint, Action of Debt or Information in any of his Majesty's Courts of Record; that is, the *Chancery, King's-Bench, Common-Pleas*, and *Exchequer at Westminster*; but not in any inferior Court of Record, and no Effeign, Privilege, Protection or Wager of Law is to be allowed: But I conceive the Privilege or Protection of Parliament are not intended in these general Words,

Words, but the common Protections and Privileges of Officers and Courts. *Ideo quære Quære. inde.*

It is not proper for this Discourse to examine by what Authority any thing at all is taken for giving Orders, Admissions, Institutions, &c. since our Saviour says, *Gratis accipistis, gratis date*: However, since it is a thing (I doubt) too much practised, use has made it seem lawful, by which means it is swallowed as a due Fee without examination of the matter; I shall therefore put them that are concerned in mind of two other Canons, and then leave the matter to further consideration, and amongst those Canons that are called the Canons of the Apostles, I find one to this effect:

See a Canon against it, and what Fees shall be taken by the Clerks.

Lindw. c. sava & miserabilis. Matt. 10. 8.

Si quis Episcopus, aut Presbyter, aut Diaconus, per pecuniam hanc obtinuerit dignitatem, deiciatur, & ipse ordinator ejus à communione omnibus modis abscindatur. Can. 30.

And in the Council of Chalcedon to the same effect, which follows:

Si quis Episcopus per pecuniam Ordinationem fecerit, & pretium redegerit Spiritus Sancti gratiam quæ vendi non potest, Ordinaverisque per pecuniam, Presbyterum, aut Diaconum, vel quemlibet de hiis, qui cognominantur in clero, promoverit, & dispensatorem aut defensorem, vel quemlibet qui subjectus est regulæ, pro sui turpissimi lucri commodo, is qui hoc attentare probatus fuerit, proprii gradus periculo subjaceat, & qui ordinatus est, nihil ex hac Ordinatione, vel promotione quæ est pro negatione facta proficiat, sed sit alienus à dignitate, vel solitudine,

dine, quam pecuniis acquisivit, &c. Concil. Cabilonenſe, c. 16. ad eandem ſententiam.

But it may be it will be ſaid, That theſe Canons are againſt ſelling of Orders, but not againſt ancient and juſt Fees; to which hear what the Council of Orleans ſays:

Can. 3.

Ne quis Episcopus quibuſlibet cauſis vel Episcoporum Ordinationibus cæterorumq; Clericorum aliquid accipere præſumat, quia Sacerdotem nefas eſt cupiditatis venalitate corrumpi.

Can. 63.

And the Council of Lateran under Pope Innocent the Third, decreed, *Ne pro consecrationibus Episcoporum, aut benedictionibus, aut ordinibus, aliquid accipiatur.*

And to the like effect is the Council of Braga, cap. 4.

Cap. Sæva &
Miserabilis.

And our own Canons are to the ſame effect, and limit the Clerks Fees to Twelve pence for Letters of Inſtitution and Collation, and Six pence for Letters of Orders: But he that has a mind to ſatisfy himſelf herein further, let him read that moſt excellent Hiſtory of the Council of Trent, which is faithfully tranſlated by Sir Nathaniel Brent, where this Point is excellently diſcuſſed *Pro* and *Con*, where I will leave my Reader, and conclude this Chapter, and in the next place ſhew my Parſon, Vicar, &c. what he is to do before, at, and after his Admiſſion, Inſtitution and Induction.

See Stilling-
fleet's Caſes,
85.

In the former Impreſſions of this Book, Chap. 5. pag. 35. I mention'd a Canon to be made Anno 1229. in the time of Richard Wettershead Archbiſhop of Canterbury, therein following the Error of the Learned Lind-
wood;

wood; which in truth was made in the time of another *Richard* Archbishop of *Canterbury*, who lived in the time of *Henry* the Second, at a Synod held at *London*, 1175. in the presence of two Kings, viz. *Hen. 2.* and his Son that was Crowned in his Father's life time, and confirmed the same, which made that no more than a Canon, which I do affirm could not deprive any body of his Freehold or Inheritance. And my Lord *Hobart*, in his Argument of *Winchcombe's* Case against the Bishop of *Winchester* and *Puleston*, affirms as much, That if the Statute had not given the Presentation to the King, where the Church was void by Simony, the Patron ought to have presented; which proves he had not lost his Patronage. Hoved. 310. b.

And as to the Canon of *Orthobon*, which I vouch in the next Page, which makes all Simoniackal Contracts void, I affirm it to be of as little force as the former, as to making a Simoniackal Contract void: And of the same Opinion was my Lord *Hobart*, who says, That a Simoniackal Contract is, *Contractus ex turpi causa & contra bonos mores*, and so is against the Law, and void by the Statute, not by the Canon. Hobart 167.

Since this Book was last Printed, in the First of *W.* and *M.* there was an Act made, That after the death of a person Simoniackally presented, the Offence or Contract of Simony should neither by way of Title in Pleading, or in Evidence to a Jury, or otherwise hereafter be alledged or pleaded to the prejudice of any other Patron innocent of That 1 W. & M. relief for Leases made by Simoniacks.

of Simony, or of his Clerk, by him presented or promoted upon pretence of Lapse to the Crown, Metropolitan or otherwise unless the person Simoniack or Simoniacally presented, or his Patron, was convicted of such offence at the Common Law, or some Ecclesiastical Court, in the life-time of the person Simoniack or Simoniacally promoted or presented, any Law, Statute, &c.

And by the same Act it is further provided, That no Lease or Leases really and *bona fide* made, or then after to be made by any person as aforesaid, Simoniack or Simoniacally promoted to any Deanery, Prebend or Parsonage, or other Ecclesiastical Benefice or Dignity, for good and valuable Consideration to any Tenant or person, not being privy unto, or having notice of such Simony; but shall be good and effectual in the Law, the said Simony notwithstanding.

See the Statute at large, *For confirming Leases made by Simoniacks.*

C H A P. VI.

What a Clerk is to do before, at, and after his Admission, Institution and Induction, to make him a compleat Parson.

NO Man at this day is capable to be Every Parson and Vicar must be a Priest.
 Parson, Vicar, &c. before he is a Priest in Orders, which he cannot be before he is Four and twenty years of Age, as has been said; and if any person shall be admitted, instituted and inducted into any Living before he is in Holy Orders, his admission, institution and induction are void Stat. 14. Car. 2. cap. 4.
 by the late Act of Uniformity.

Secondly, He must make his Subscription according to the said Act, and have a Certificate from the Bishop, or, &c. under his Hand and Seal, that he hath so done; and then within two Months after he is inducted, he must, during Divine Service (that is, after some part of the Divine Service of the Church for that day appointed is read, and before the whole is finished) read the Nine and thirty Articles of Religion in the Parish-Church, &c. into which he shall be inducted, and declare his unfeigned assent and consent to all that is therein contained; and in default herein, the Church is *ipso facto* void without any Sentence declaratory; and it is not enough for him to de-

Subscription and Certificate.

13. El. ca. 12. Read Pr^o vers.

Read the Articles.

Stat. Supra.

Co. 6. 29. b.

4 Inst. 324.

clare his assent to them so far as they are agreeable to the Word of God, or with any qualification, but positively.

Stat. supra.

Declaration.

And he must likewise upon some Sunday or Lord's day, within two Months after actual possession of such Benefice, &c. (which is intended within two Months after Induction or Installation, &c.) read the Book of Common Prayer, (i.e. the whole Service of the Church appointed for that day, as it is there appointed) and like declare his assent and consent to all the matters and things therein contained, in these words; I A. B. do declare my unfeigned assent and consent to all and every thing contained and prescribed in and by the Book, intituled, *The Book of Common Prayer and Administration of the Sacraments, and other Rites and Ceremonies of the Church according to the use of the Church of England together with the Psalter or Psalms of David, pointed as they are to be sung or said in Churches, and the form or manner of making, ordaining and consecrating of Bishops, Priests and Deacons.*

Stat 14 Car. 2.
cap. 4.

And such Parson, Vicar, &c. must within three Months after his Institution, upon some Lord's day, during Divine Service, (that is as hath been said, after some part of it be read, and before all be read) publicly and openly read his Certificate from the Bishop &c. of his Subscription to the Declaration following; and he must at the same time read the Declaration or Acknowledgment of himself in the Church where he is to officiate, before the Congregation there assembled. The Declaration follows:

I A. B. declare, [That it is not lawful upon *This part is repealed by a Statute made by K. William and Q. Mary, 24th. day of April, 1683.*
 pretence whatsoever, to take Arms against the King: And that I do abhor that treasonable
 action of taking Arms by his Authority against any Person, or against those that are Commissioned by him:] And that I will conform to the Liturgy of the Church of England, as it now by Law established. [And I do declare, That I do hold, there lies no obligation *This part is expired,*
 on me, or on any other person, from the Oath commonly called, The Solemn League and Covenant, to endeavour any change or alteration of Government, either in Church or State; and that the same was in it self an unlawful oath, and imposed on the Subjects of this Realm against the known Laws and Liberties of this Kingdom.]

If any Parson, Vicar, &c. fail in the doing of any of these things before-mentioned, or any of these things be neglected, the Church becomes void; and the Clerk that makes such failure, in case he shall sue for Tythes, or any other Church duty, or other thing belonging to his Church, if the Defendant insist upon it, must prove the doing of all these things. But usually the Judges in favour of the Clergy, after they have been in possession of their Livings ten or twenty years, or any considerable time, will presume all these things regularly done, and will not put the Parsons, &c. to the precise proof of them. *Dyer 346. p 7. Co 6. 29. b.*

And it is observed, That the Parsons, Vicars, &c. must upon the acceptance of every new Living or Ecclesiastical Preferment *Advice to the Clergy.*

within this Law, repeat all these things; for the performance of all these things upon the taking of one Living, will not satisfy for any other

I shall give my Reverend Clergy-men therefore this Caution, That if any of them have accepted any Ecclesiastical Preferments, and have negligently omitted any of these things, and that thereby they may be lapsed to the King, that they obtain Presentations from the King *ad Corroborandum*; and that thereupon they perfect all their former neglects; or they may obtain Letters Patents of Confirmation, which may be pleaded in bar of any *Quare Impedit* after brought by the King.

And for the future I advise them, That they first have some credible Witnesses present, when they make their Subscriptions before the Bishop; and that they attest the Bishops Certificate; and that they get two Books of Articles; and that when they read the 39 Articles, they give one of those Books of Articles to some credible Parishioners to read with them, and then attest the Book, that they were present, and heard the Clerk read the said 39 Articles during the time of Common-Prayer, and declare his unfeigned assent and consent to all the matters and things therein contained, by subscribing their Names thereunto; and that the Clergy-man keep safely the said Book of Articles with this attestation.

And I advise, That when he reads the Book of Common-Prayer, which must (as above is said) be read Morning and Evening

Rastals Entries.
Quare Imped.
Roy 22. Plo.
528. b.
11 H. 4. 9. a.
Hob. 102.
Dy. 392. p. 70.
14 H. 4. 36. b.
25 E. 3. 47. a.
Plo. 528. b.
Rast. Entries.
Quare Imped.
in Roy 22.

all things which is prescribed therein, within two Months after Induction; that he likewise make some intelligent Parishioners to read with him, and give them a copy of the Declaration aforesaid, and at the foot of it make an attestation under their hands, of his reading the said Book of Common-Prayer and Declaration, which may be done in this Form:

First in a fair legible Hand write the Declaration aforesaid; then write under to this Effect; *Memorand. That upon Sunday the* *_____* *of* *_____* *in the year of our Lord*
B. Parson of D. in the County of D. read Common Prayers in the Parish Church of D. aforesaid, both in the Forenoon and Afternoon of the same day, according to the Form and Order prescribed and directed by the Book, intituled, the Book of Common-Prayer and Administration of the Sacraments, and other Rites and Ceremonies of the Church, according to the use of the Church of England, together with the Psalter or Psalms of David, pointed as they are to be sung or said in Churches, the form or manner of making, ordaining and consecrating of Bishops, Priests and Deacons: And immediately after reading the same, make a Declaration of his unfeigned assent and consent, to all the matters and things therein contained in the form and words above-written. And then let the Witnesses hereunto subscribe the same Certificate; which the Clerk is to keep carefully with his Institution, Induction and Certificate, with the Book of Articles attested, as is before directed. And

in these things I advise all the Clergy-men, to be very tender and careful.

13 El. cap. 12.
What age a
Parson ought
to be of.

There was an Act made in the thirteenth year of Queen Elizabeth, That none should be admitted to any Benefice, unless he were three and twenty years of age, and a Deacon at least, and should subscribe the Thirty nine Articles before he should be admitted; and that none should be admitted to preach or administer the Sacraments, unless such persons were 24 years of age at least. But this Law is in part altered by the before-mentioned new Statute of Uniformity; for now none can be admitted to any Living till he is a Priest in Holy Orders, which he cannot be by this Statute, till he is 24 years of age.

Who may be
admitted to a
Benefice of 30 l.
per annum in
the King's Books.

And by the same Statute it is enacted, That none shall be admitted to any Benefice with cure of Souls, of the value of 30 l. or upwards in the King's Books, unless he be a Batchelor of Divinity at least, or a Preacher licensed by some Bishop, or one of the Universities of this Kingdom; and if not so qualified, his Institution to be void.

Otely versus
Shepherd, circa
13 Car. 1. C. B.
in Qu. Imp.

If one be instituted into a Benefice under the age of 23 years, whereby it is made void within the Statute of 13 Eliz. yet no Lapse shall incur, because the Presentment is not made void.

It may be a Question, Whether Parsons, Vicars, &c. are within the late Act for preventing Dangers which may happen from Popish Reculants; therefore it is a safe way to receive the Sacrament, take the Oaths, and make the Subscriptions prescribed by that Act; *Cantela abundans non nocet.*

C H A P. VII.

The Duty of the Parson Vicar, &c. after Induction, and the former Ceremonies performed; and treats of Non-residence, and the Penalties thereof, and for what Reasons the same may be excused.

HE that has orderly, as aforesaid, obtained Parsons, &c. an Ecclesiastical Preferment in the Church must be conformable to the Govern-
ment and Orders thereof, and must not use any other publick Form of Prayer than what is prescribed by the Book of Common Prayer before-mentioned, neither must he administer the Sacraments of Baptism and the Lord's Supper in any other manner or form, than what is therein and thereby directed and prescribed. Stat. 1 Eliz. c. 2

And if any Incumbent be resident upon his Living, (as he ought to be) and keep a Curate, St. 14 Car. 2. c. 4. he is bound by the Act of Uniformity once every month at least, to read the Common Prayers of the Church, according as they are directed by the Book of Common Prayer, in his Parish Church in his own person, or he forfeits 5 l. for every time he fails therein. See the Statute how he is to be convicted, and the penalty to be levied. When, and how oft he must read the Common Prayers.

And the Common Prayer by that Statute is to be read before every Lecture; and is it not sufficient to read a piece here, and a piece there, Before every Lecture. where

where the party pleases ; but they must read the whole appointed for the day orderly, as it is appointed with all the Circumstances and Ceremonies of kneeling and standing, as is prescribed, otherwise it is no reading of Common Prayers within this Law ; quod nota.

St. 14 Car. 2. c. 4.

And note, That by the late Statute of Uniformity, the former Statutes of Uniformity and Penalties therein, are extended to this Book of Common Prayer now lately established.

St. 1 Eliz. c. 2.

The Penalty for
using other
Forms of Prayer,
&c.

And by the Statute of 1 Eliz. it is enacted, That, if any Minister, that ought or should sing or say Common Prayer, &c. refuse to use the same Common Prayers, or to administer the Sacraments, &c. in such order and form as they are mentioned and set forth in the Common Prayer Book, or shall wilfully or obstinately standing in the same, use any other Rite, Ceremony, Order, Form or Manner of celebrating the Lord's Supper, or other open Prayers, or shall preach, declare or speak any thing in derogation or depraving of the same Book, or any thing therein contained, &c. upon Conviction, the party guilty of any of these offences, forfeits the profits of all his Living and Spiritual Promotions for a year, and is to suffer Imprisonment for six months without Bail or Mainprise ; and upon a second Conviction for the like offence, he is to suffer Imprisonment for a whole year, and be deprived ipso facto of all his Spiritual Promotions ; and upon a third Conviction for the like offence shall be imprisoned during his life, and lose all his Spiritual Promotions, if he have any : And if such person have no Spiritual Promotions, then for the first offence he is to be imprisoned for a year, for the second during life without Bail or Mainprise.

I have been the briefer in these matters upon the Statutes of *Uniformity*, because they are printed at large before the Book of Common Prayer, to which I refer the Reader for his fuller satisfaction; and they are so plain and full, that they need no Comment, but to advise all Clergy-men to read and observe them cautiously.

I shall only give the Reader this further ^{13 Eliz. c. 12.} Caution, That if any Parson, Vicar, &c. shall maintain any Doctrine, contrary to the Thirty nine Articles of Religion, it is cause of Deprivation; or if he administers the Sacraments in any other Form than is prescribed by the Book of Common Prayer, he forfeits 100 l. by a Statute made in the 13th year of *Q. Elizabeth*. And by the new Statute of *Uniformity* this Penalty is extended to such as do it contrary to the present Book of Common Prayer now used.

The next Duty incumbent upon the Parsons, Vicars, &c. is, that they be resident upon their Cures, a Duty incumbent upon every one that hath the cure of Souls in the Church of Christ: For, as *Padre Paulo* in his ^{Page 217. in the English Translation.} most excellent History of the Council of *Trent* observes, That in the first 700 years after Christ there was not any such thing known in the Western Church, that any ^{Non-residence when it came into the Church.} man should have an Office or Title in the Church, and not do the duty; and many Canons and Decrees have been made against Non-residence: And in the Council ^{The same Hist. p. 217, &c. 486; &c. 509, &c. 496.} of *Trent* it was held by much the greater and better number of the Prelates and Fathers

*Residence Jure
Divino.*

*Selden de De-
clinis 106, 107.*

*The exact A-
bridgment of
Records, nu. 50.*

*Ibid. H. 4.
num. 113.*

*Ibid. 5 H. 4.
num. 70.*

*Ibid. 4 H. 5.
num. 38.*

thers in that Council, that Residence was *Jure Divino*, and undoubtedly had been so decreed, if the Pope had not used all his old Stratagems against it; but whilst the Pope had power to dispense with Residence, all the Canons and Decrees of that Church were of little greater effect, than to fill his Coffers with Money; for in this Kingdom, how many Bishopricks, Abbies, Pories, &c. were enjoyed (I mean the Profits of them) by Foreigners, that never saw them, or took any care of their Duties? I should be glad if it were much better now.

The Commons of *England* often complained against Pluralities and Non-residence, and in the Parliament held 2 H. 4. the Commons prayed, That all such as procured from *Rome* (for in those days they came from *Rome*) any Bulls for Pluralities or Non-residence, should incur the pain of *Provisoes*; except the Chaplains of Archbishops and Bishops, and Scholars; and those that had any Bulls should cancel them.

And in the Parliament held 8 H. 4. the Commons petitioned, That the King might have a moiety of the Profits of all Benefices where the Incumbent was Non-resident.

The like was prayed in the Parliament in 9 H. 4.

In the Parliament 4 H. 6. it was prayed by the Commons, That all Parsons and Vicars, and others having Cures, and not being resident thereupon, should forfeit their Benefices, the one half to the King, and the other half to the Patron.

In

In the Parliament held the same year, ^{Ibid. 4 H. 6. sum. 31.} the Commons prayed, That for the Non-residence of the Incumbent, the Patron might present a new Clerk; and great reason in my Judgment, and very agreeable to the Rules of the Common Law, where a Temporal Officer loses his Office for Non-user: And I know no reason why it should not be so in Spiritual Offices, where the Souls of a many poor People are neglected. But these had none of them the good fortune to be reduced into Laws; but I presume these Complaints in Parliament so awakened the Pope and Clergy, that there was some Reformation: For I find no more Complaints in Parliament concerning this matter, till the 21 H. 8. In which Parliament it was enacted;

That as well every Spiritual Person then being promoted to any Archdeaconry, Deanry or Dignity in any Monastery or Cathedral, or other Church Conventual, or Collegiate, or being beneficed with any Parsonage or Vicarage; as all and every Spiritual person, which then after should be promoted to any of the said Dignities or Benefices with any Parsonage or Vicarage from the Feast of St. Michael then next following, should be personally resident and abiding in, as or upon his said Dignity, Prebend or Benefice, or one of them at the least; and that if any such person wilfully absented himself from his said Benefice, &c. by the space of a Month at one time, or two Months at several times in any one year to be accounted at several times, that such person so absenting himself should forfeit 10 l. for every such default, the one half to the King,

^{21 H. 8. cap. 13.}
Act against Non-residence.
the

the other half to the Informer, to be recovered, as is expressed in the Act.

And by the same Act, there is a *Proviso* worth mentioning, though now out of date, to this effect :

That if any person should procure any Dispensation from Rome, or elsewhere, to be Non-resident, the party guilty should forfeit Twenty pounds.

By this and other Statutes mentioned in this Book it is evident, That the Parliaments of *England*, even when the Pope was in full power, often made bold with his Holiness, to correct his and his Courts corruption.

Certainly this was an excellent Law, if there had been no more in it but the dispensing with such persons as by the same Law are qualified to have two Livings: and the persons capable to qualify Chaplains to have Pluralities had not been grown so numerous, that there are but few of the best Livings but they are held by Pluralists, and they either by colour of attending their Lords, their Deanries or Prebends, find an excuse to be Non-resident, which has made this Law of little effect ; nay, I doubt I may say, That we are now in a far worse condition than before the making of this Act : For Dispensations from *Rome* (as all other things there) were costly, came slowly, being far to fetch ; that I presume there's ten Dispensations for Pluralities now, for one then ; and few of those dispensed with were Non-residents upon both Livings, as now they be : Two great Parishes in
many

many places being left to the care of two Boys that came but the other day from School, and perhaps fitter to be there still, whilst the Shepherd that takes the Fleece, either Feasts it out in his Lord's Family, or takes his ease upon a Prebend or Deanry.

This good Law principally aimed at *The end of this Law.*
three ends or effects:

1. That every Clergy-man might attend *To do their Duties.*
his duty in reading the publick Prayers of the Church, administering the Sacraments, Preaching, inspecting the behaviour of his Flock, and performing all sacred and divine Offices, like a good and faithful Shepherd: And I do wonder, with what Conscience any Clergy-man can expect his dues from his Parishioners, that does not perform his Duty in the first place.

2. The second end of this good Law, is *To avoid Dila-*
to avoid Dilapidations in the Buildings be- *pidations.*
longing to their Livings: For you shall seldom see a Non-resident, but he is also a Dilapidator; and 'tis no wonder that he that neglects the Flock, lets the Sheepfold go to ruin.

3. The third end of this good Law, was *To maintain*
to maintain Hospitality: And I would wish *Hospitality.*
every Clergy-man to remember, that the *St. 15 R.2. c. 6*
Poor have a share in the Tythes with him. *& 4 H.4.c.12*

Pope Sylvester, in the beginning of the fourth Century, decreed, That the Revenues of the Church should be divided into four parts: *Quarum una cedat Pontifici ad sui sustentationem; Altera Presbyteris & Diaconis, & omni Clero: Tertia Templorum & Ecclesia-* *Can. 4. Vide Appendix at the end of this Chapter.*

rum reparationi; Quarta pauperibus & infirmis, & peregrinis.

Can. 24.
Lamb. 132.

And by a Canon of our own made in the time of King *Alfred*, it is decreed, That the Tythes should be delivered to the Priest, who should divide them into three parts: *Unam partem ad Ecclesie reparationem; alteram pauperibus erogandam; tertiam vero ministris Dei qui Ecclesiam ibi curant.*

Cap. in decimis.

And by a Provincial Canon of our own, it is ordered, *Quod religiosi beneficia Ecclesiastica obtinentes, secundum hujusmodi beneficiorum facultates annis singulis pauperibus parochianis beneficiorum eorundem certam Eleemosynam quantitatem, Ordinariorum ipsorum locorum moderandam arbitrio, per ipsos Episcopos distribuere compellantur, &c.* By all which it appears, that originally the Poor had a share in the Tythes.

And to this end the Statute enjoyns the Clergy-man to be resident in and upon his Living, that is, his Parsonage or Vicarage House, if he have any, and not at any other House in the Parish; but Imprisonment

Co. 6. 21. b.

More 540. du-
bitatur.

† Lindw. 67. b.
accord.

without fraud, or removing for † Health without fraud, or not having a House upon his Glebe, excuses his Residence for the time; for the words of the Statute are, [*That he that wilfully absents himself.*]

* But by the Stat. of 28 H. 8. c. 13. this Law is restrained to such as are under 40 years of age, and do the Exercises of the University.

So if any Parson, Vicar, &c. shall be in the King's Service beyond Sea, or in any Pilgrimage, or shall without * fraud abide in any University within this Realm to study, or is a Chaplain qualified within this Statute, to have Plurality of Benefices, or the Chaplains of any of the Judges of the King's Bench or Common-Pleas, Chancellor

Chief Baron of the Exchequer, of the King's, ^{Who may be}
 Attorney and Solicitor, and the Chaplains of the ^{Hon-residents.}
 Chancellor of the Dutchy of Lancaster, of the ^{25 H.8.c.16.}
 Augmentations, First-fruits and Tenths; of the ^{33 H.8.c.28.}
 Master of the Wards, the Surveyor General; of
 the Treasurer of the Chamber and Augmenta-
 tions, and Groom of the Stool, whilst such Chap-
 lains abide and are attendant in the Households
 of their Masters; and the Master of the Rolls,
 the Dean of the Arches, and the Chancellors ^{21 H.8.c.13.}
 and Commissaries of Archbishops and Bishops,
 and the Twelve Masters of the Chancery, so
 long as they shall continue in their places, may
 be Non-resident: But the Chaplains of the ^{33 H.8.c.28.}
 Chancellor of the Dutchy, Augmentations, First-
 fruits, Master of the Wards, Surveyor General,
 Treasurer of the Chamber and Augmentations,
 and Groom of the Stool, are to be Resident twice ^{9 E.2. c.8.}
 a year at least, Eight days at each time: And
 the King may give license to any of his own
 Chaplains to be Non-resident: And any Ec-
 clesiastical Person, to attend any Suit in the ^{21 H.8.c.13.}
 Chancery or Star-Chamber without fraud,
 may be Non-resident for so long time, &c.

There is another Proviso in this Statute ^{Master dies,}
 that enables the King to give his Chaplains &c.
 as many Livings as he pleases, and to dispense ^{Co.1.119 a.}
 with their own Residence. ^{Co.6.21.}

But if a Chaplain be qualified in respect
 of his Service to have a Plurality, and his
 Lord or Master die, be attaint of Treason,
 Felony, or removed from his place, it will
 not serve the Chaplains turn to be resident
 upon one of his Livings without the King's
 special License, with a Non obstante.

Regist. Orig.

58.b.1

F.N.B.44.8.

And here I must not omit an ancient Prerogative of the Kings of *England*, practised in the height of Popery, That where any Clergy-men were employed in the King's Service, he might dispense with their Non-residence ; and if the Spiritual Judges went about to censure or punish them by Ecclesiastical Censures for such Non-residence, the Kings of *England* have sent their Writs Mandatory , commanding them to surcease.

Concil. gener.

Const.Can.80.

Concil. Sardi.

Can.15. Const.

Othon. *Quid**ad venerabiles**Patres.**Bishops resi-**dence requi-**table.*

2 Inst.625.

But Bishops and Archbishops are not within this Law, but not exempt from this Duty; there being several Canons that require it: And Bishops may be compelled hereunto by Ecclesiastical Censures by their Superiors ; and the King may compel them by seizing their Temporalities.

A notable President whereof we have in the time of *H. 3.* when Popery was at highest, and the King not look'd upon as Head of the Church ; yet that King sent his Writ Mandatory to the Bishop of *Hereford*, to be attendant upon his Bishoprick, otherwise he would seize of all his Temporalities. Which Writ, as well for the rarity, as also for the Religious grounds upon which it was granted, will not be ungrateful to the Reader to see, and for whose satisfaction I shall give it him as I find it recorded by *Sir Edward Coke*, and wish there were no cause to make use of it in these days:

Rex Episcopo H. salutem. Pastores grebibus preponuntur, ut diei, noctisque vigilias exercendo, oves famelicas in fertilitatis pascua introducant :

roducant : Errantes vero per verbum salutis,
 & virgam correctionis in unius ovilis conser-
 vare studeant indissolubilem unitatem : Sed
 sunt nonnulli qui hanc doctrinam dampnabi-
 liter contemnentes, & sua ab aliis pecora distin-
 guere nescientes, lac & lanam tollunt, qualiter
 dominicus grex alatur non curantes, temporalia
 capiunt : Et quis in parochia fame pereat, aut
 periclitetur in moribus, non attendunt ; qui non
 Pastores, sed Mercenarii potius dici promeren-
 tur : Hoc siquidem dum hiis diebus ad disponen-
 dum de regni nostri præsidiis in partes Marchiæ
 nos transferemus in Ecclesia vestra, (dolenter
 asserimus) nos invenisse, quam adeo invenimus
 pastoris solatio destitutam ut nedum Episco-
 pum, sed nec officialem haberet, Vicariam aut
 diaconam qui quicquam spiritualitatis exercere
 possit in eadem. Sed Ecclesia ipsa quæ olim de-
 cibus affluere consuevit, & Canonicis qui ibidem
 æternis & diurnis officiis vacare, & opera
 caritatis exercere deberent, eam deserentibus
 & longe degentibus in remotis, stola fucundi-
 tatis exuta cecidit in terram, viduitatis suæ de-
 limenta deplorans, nec est qui consoletur eam
 de omnibus curis ejus : Sane dum hæc vidimus,
 & consideramus diligenter, pietatis, aculeus,
 viscera nostra commovit, & compassionis gla-
 dius intima cordis nostri acrius vulneravit, ut
 tantam Ecclesiæ matris nostræ injuriam ulterius
 simulare non possimus, nec pertransire incor-
 rectam. Quapropter vobis mandamus firmiter
 jungentes, quatenus ad Ecclesiam vestram
 prædictam, occasionibus quibuscunque postpositis,
 in ea qua poteritis celeritate vos transferri
 curretis, commissum vobis in eadem cura pasto-
 rali officium personaliter Executor. &c. Alioqui

scire vos volumus pro constanti, quod si istuc fieri non curaveritis, bona temporalia, & omnia quæ ad baroniam ipsius Ecclesiæ pertinent, quæ donatione constat eidem fuisse collata, & quæ hactenus colligi & salvo custodire precipimus in commodum & utilitatem ipsius Ecclesiæ convertenda, cessante jam causa in manu nostra totaliter capiemus, nec ulterius sustinebimus, quod temporalia metat, qui spiritualia ad quæ ex officii sui debito tenetur, irreverenter subtrahere non formidat, aut quod emolumenta percipiat, qui incumbencia ejusdem onera subire recusat, &c. Teste, &c.

This Writ was sent by **HENRY** the Third, to *Peter de Egueblanke* a Savoyard, then Bishop of Hereford, who, as the History of those times relate, had never a good, but many bad qualities, that constantly attend Men that are negligent of their duties to God and Man in this kind: how little care soever he took of Duty, you hear, *lac & lanam sustulit, temporalia rapuit* by which means he was grown intolerably rich; and mark what came of his Wealth: the rebellious Barons seized on him in his Cathedral Church at Hereford, and took all his Goods and Treasure, and divided it amongst their Soldiers: Even so may it fare with all such Bishops.

Now my hand's in, I will beg the Reader's patience, to inform him what *Pope Damasus*, one of the better sorts of Popes said in an Epistle of his to such Bishops; and it was thus:

Primum

*Primum quod curam sibi commissam negligunt, cum Dominus dicat ; Bonus Pastor animam suam ponit pro ovibus suis, mercenarius autem videt lupum venientem, & demittit oves, & fugit, &c. Secundo, illi Episcopi qui talia præsumunt, videntur mihi (ait) esse meretricibus similes, quæ statim ut pariunt, infantes suos aliis nutricibus tradunt educandos, ut suam citius libidinem explere valeant. Sic & isti infantes suos, id est, populos sibi commissos aliis educandos tradunt, ut suas libidines expleant, id est, pro suo libitu sæcularibus Curis inbient, & quod uni-
 cuique visum fuerit, liberior agunt: Pro talibus enim animæ negliguntur, oves pereunt, morbi crescunt, hæreses & schismata prodeunt, Ecclesiæ destruuntur, sacerdotes vitiantur, & reliqua mala proveniunt. Non taliter Dominus docuit, nec Apostoli instituerunt, sed ipsi qui Curam suscipiunt, ipsi peragant & ipsi proprios manipulos Domino representant. Nam ipse ovem perditam diligenter quæsit, ipse invenit ; ipse propriis humeris reportavit, nosque ad ipsum facere perdocuit. Si ipse pro ovibus tantam curam habuit, quid nos miseri dicturi sumus, qui etiam pro ovibus nostris commissis Curam impendere negligemus, & aliis eas educandas tradimus ? Corrigantur hæc (fratres) necesse est, quia, qui plus laborat, majorem mercedem accipiet.*

And now I have done with Non residence, one of the Pests of the Church : I will in the next place shew what Dilapidations are, and the severall ways the same are punishable ; this being often the effect and fruit of Non-residence.

Whereas in the former Impressions of this Book, *Chap. 7. pag. 67.* I cite a Canon of Pope *Sylvester*, whereby it is decreed, That the Revenues of the Church should be distributed into four parts, one to the Bishops, a second to the Clergy, a third to the Repairs of the Church, and a fourth to the Poor, and to the Infirm, and Pilgrims. There is a Learned Person that has publish'd a Book in defence of Pluralities, but is endowed with so much Modesty, that he is ashamed to tell his Name; yet is not ashamed to reflect upon me for writing against them, who in the beginning of his Third Chapter, *pag. 155.* says, 'It remains in the third place to be manifested, That the use of Pluralities, as now practised, is not inconvenient to the Church.

' These Inconveniences, as they are urged, and exaggerated by the Oppugners of Pluralities, may be reduced to these four Heads: And after he has named the four Heads, *pag. 158.* he charges, 'That the Author first named (meaning me) hath affirmed many things which are downright false, in other things hath betrayed a gross Ignorance. The other Author is a person of too great Worth and Learning, to be guilty either of Fraud or Ignorance; but only has suffered himself to be herein transported with too much Heat and Zeal before he well considered the case; so that wheresoever in the following Answer I shall charge Fraud or Ignorance upon the Objections, I desire it may be referred to the first Objector.

So

So you see this Nameless Author hath done me the credit to place me in Honourable Company ; but charges me to have affirmed many things that are downright false, and in other things to have betrayed a gross Ignorance, but charges nothing in particular that is false.

But *pag.* 166. he saith, ' That it is something shameful for a Professor of Law to cite the Decrees of Pope *Sylvester* as genuine, which were forged almost 500 years after his death.

This Learned Gentleman might have done well to have made some proof of this Assertion, for the better information of my Ignorance. Pope *Sylvester* is reported to have been a very good Man, and lived about the end of the Third Century : And *Caranza*, a famous Canonist, mentions this Canon to be made by a Council of 275 Bishops, held *intra Thermas Domitianas* at Rome, and confirmed by *Constantine* the Emperor, and the Empress *Helena* his Mother.

And that good Pope *Sylvester*, and Padre *In his Treatise*
Paulo the Author of the History of the *De rebus beneficiis* 26.
Council of *Trent*, does affirm, That such a Division of the Church Revenues was made in the year 470 ; but concludes, that some do attribute this Devotion to Pope *Sylvester*, who was 150 years before that time : But why any body should forge this Canon 500 years after *Sylvester's* death, which must be in the end of the Eighth Century, I know no reason, the matter being 300 years before that time, settled first by a Decretal

Causa 12. q. 2.
de Reditibus.

Epistle of Pope *Simplicius* to *Florentinus*, *Equitius* and *Severus*, Bishops, which lived about the latter end of the Fifth Century; who says, *De redivibus Ecclesie vel oblatione fidelium quid deceat nescienti nihil licere permittat, sed solo Episcopo ex his una portio remittatur: duæ Ecclesiasticis fabricis & Erogationi peregrinorum & pauperum profuturæ à Bonargro Presbytero sub periculo sui ordinis ministrentur; ultima inter se Clericis pro singulorum meritis dividatur.*

De Epist. lib. 15.

And *Gregory* the First, in his Answer to the first Question made to him by *Augustine*, first Archbishop of *Canterbury*, about the end of the Fifth Century, tells him, *Mos est Apostolicæ sedis ordinatis Episcopis præceptum tradere, quod de omni stipendio quod accedit quatuor fieri debeant portiones, una videlicet Episcopo & famulæ ejus propter hospitalitatem & susceptionem, alia Clero, tertia vero pauperibus, quarta Ecclesiis reparandis.*

So that upon the whole matter it appears, by what is now and heretofore said, there was no need in the Eighth Century to forge a Canon for this purpose in *Sylvester's* Name; nor is there any doubt, but that by the Canon Law the Poor ought to have a share in the Revenues of the Church. Which was all I endeavoured to prove.

C H A P. VIII.

What Dilapidation is, and in what manner punishable, and what Remedies the Successor hath.

A Dilapidation, is the pulling down or destroying in any manner any of the Houses or Buildings belonging to a Spiritual Living, or the Chancel, or suffering them to run into ruin or decay ; or wasting and destroying the Woods of the Church, or committing or suffering any wilful waste in or upon the Inheritance of the Church. And certainly there can be nothing worse becoming the Dignity of a Clergy-man, than Non-residence and Dilapidations, which for the most part go hand in hand. I wish our Church had not too much reason to complain of both.

There have been divers Canons of the Church made against this Crime, as I may justly call it ; but as in others, so in this, I shall confine my self to our own Provincials : And I find in a Provincial Council or Synod held under *Edmund* Archbishop of *Canterbury*, in the Year of our Lord 1234. which was, as I take it, about the 18th year of *H.3.* a Canon to this effect :

Si Rector alicujus Ecclesiæ decedens domos Ecclesiæ deliquerit dirutas, de bonis suis Ecclesiasticis tanta portio deducatur, quæ sufficiat ad

Canon against Dilapidation. Lindw. Chap. Si Rector alicujus Ecclesiæ repa-

Vide Canon
Othobon de do-
mibus Ecclesia-
rum reficiendis,
in the Appendix
in the twelfth
Chapter of this
Book, hic in
finē.

*reparandam hæc, & alios defectus Ecclesiæ sup-
plendos. Item statuimus circa illos Vicarios, qui
soluendo modicam pensionem omnes Ecclesiæ ha-
bent proventus: Nam cum ad præmissa tenea-
tur talis portio deducta, satis poterit & debet
inter debita computari: Semper tamen rationa-
bilis consideratio sit habenda ad facultates Eccle-
siæ, cum portio fuit habenda.*

Now if it be demanded what Houses are
meant within this Canon, the Gloss tells
you, *Ut puta mansum Rectoriæ, Vicariæ &
alia Edificia quæcunque, quorum Edificatio sive
reparatio spectat ad ipsum Rectorem.*

Co. 5.6.7.

Cro. Eliz 659.

Not to repair
the Church, but
Chancel.

By the Letter of this Canon the Rector
is to repair the whole Church; but by the
Custom of England the Owners of the
Houses and Lands in every Parish are bound
to repair the Body of the Church, and the
Rector only the Chancel; unless by parti-
cular Custom it hath been otherwise: And
in this Point the Common Law is kinder to
the Parsons, Vicars, &c. than the Canon
Law; and the Common Law being here
to be preferred, annuls that part of the
Canon.

2 Inst. 653.

A Canon for
relief against
Delapidations.

And the Gloss upon the word *Defectus*
Ecclesiæ adds, *Hæc litera potest intelligi de
defectibus Ecclesiæ, quæ pertinent ad curatum
ipsius Ecclesiæ in solidum, sic quod non pertine-
ant ad alios, ut puta, in Cancellæ, & aliis ad
onus Rectoris de jure vel consuetudine spectan-
tibus.*

But this Canon seems only to affect the
Ecclesiastical Goods: And what those might
be, deserves the Judgment of the Gloss,
which tells you they are such as *Jure*
&

& nomine Ecclesiæ obvenientibus; talia enim bona sunt per viam tacitæ hypothecæ ad reparationem hujusmodi faciendum obligatæ. Verb. Ecclesiasticis.

And if the Goods of the Church shall not suffice, then the Gloss tells us, *Si Rector bona Ecclesiastica expenderit in meliorationem patrimonii sui, vel si propter nimiam diligentiam propriorum negotiorum neglexerit negotia Ecclesiæ procurare, & sic Ecclesia sit dampnum passa, tenetur satisfacere de bonis suis patronalibus, si quæ habuerit.*

But there has been made a further Question, Whether satisfaction for Dilapidations should be preferred in payment before Debts and Legacies? And as the Common Law prefers the payment of Debts before damage for Dilapidations; so the Ecclesiastical Law prefers the damage for Dilapidations, before the payment of Legacies: To which hear what the Gloss says; *Si Legatarii tanquam Creditores petant legata sibi relicta, & Prælatas petat sumptus reparationis Edificiorum Ecclesiæ; talis Prælatas debet præferri cæteris Legatariis:* And gives this Reason, *Nam Legata solvi non debent nisi prius deducto ære alieno.* So that the Ecclesiastical Law agrees with the Common Law in this, That Debts are to be preferred before Legacies.

The next thing considerable is, What Repairs are requirable in this case, which is answered by the Gloss: *Et intellige hanc reparationem fieri debere secundum exigentiam & qualitatem rei reparandæ, &c.* Verbo Reparand. hæc.

Thus

Thus far I have followed the Canon, and Gloss thereupon: Now in the next place we will shew you what we have relating to this matter amongst the Laws and Statutes of this Realm.

Waste by
Bishops.

Co. 11. 49. 2.

Cause of De-
privation.

And first, I find that at a Parliament at *Carlisle*, in the 35th year of *Edward* the First, a great complaint was made against *Anthony*, then Bishop of *Durham*, for waste and destruction of the Woods belonging to his Bishoprick, by gift, sale and otherwise, and for erecting Forges of Iron and Lead, and making Charcoals of the Wood to be spent in their Iron and Lead-works, to the disinherittance and impoverishing of his Church, and in prejudice of the King and his Crown, and of the Chapter of *Durham*. To which the Answer is, *Inhibetur per breve de Cancellaria Episcopo & Ministris suis, ne faciant vastum de contentis in petitione.*

M. 23. Et inter
adjudicat co-
ram Rege.

Huntf. 83.

* Or in the
King's Bench,
Bulstr. 3. 158.

More 917.

Rot. Pat. 14 H.

3. m. 8.

Bulstr. 2. 279.

By which it appears, That if a Bishop, or any other Clergy-man, do waste upon the Woods or Lands of his Church, that a Prohibition may be sued in * *Chancery* to prohibit him: For *Ecclesia est infra aetatem & in custodia Domini Regis, qui tenetur jura & hereditates ejusdem manu tenere & defendere.*

And the Archbishop of *Duklin* was fined 300 Marks for the disafforesting a Forest belonging to his Archbishoprick.

Hollingsh. 181.
b. 30.

And *William*, Abbot of *Westminster*, in the 15th year of King *John*, Anno 1213. was deprived, because he had wasted the Revenue of his Church or Abby.

And

And it seems by several Books of the
 † Common Law, * and by the Canons of † 20 H. 6. 46. a.
 the Church likewise, That in case a Bishop, 3 Inst. 204.
 Abbot, Prior, &c. waste the Lands, Woods 2 H. 4. 3. b.
 or Houses of his Church, he may be de- Co. 11. 94. b.
 posed or deprived by his Superior: So that 25 E. 3. 16. a.
 it appears clearly, that the fault in this case 9 E. 4. 34. a.
 lies heavy upon those that have the Visita- * Causa 10.
 tion and Superiority, that do not take care q. 2. si quis Ca-
 against the wasting and destruction of the sus, *Quæstium*
 Building, Houses, Woods, &c. of the Church; fuit quam pa-
 and that the Successors should not be put to nam debeat
 seek remedy against Executors and Admini- pari Episcopus
 nistrators, who are too active in finding quum alienat
 shifts to avoid their Actions, to avoid which rem Ecclesiæ
 there is a good Law made in the 13th year nulla necessitate
 of Queen Elizabeth to this effect: cogente.

The Answer
 was, Res ipsas
 Ecclesiæ pro-
 priæ restaurare

*cogatur & in Iudicio Episcoporum dejiciatur auditus & convictus, & tan-
 quam furti aut latrocinii reus suo privetur honore.* Causa 12. q. 2. Apostol.

That if any Parson, Vicar, &c. shall make any Statute against
 conveyance of his Goods to defraud his Successor fraudulent
 of his remedy, the like Suit is given in the Conveyances.
 Spiritual Court against the Grantee, as the Suc- St. 13 Eliz. c. 2.
 cessors should have had against the Executors or
 Administrators of the Predecessors.

But this Act gives no remedy at Common
 Law, because by another Act made at the
 same Parliament, all such Grants, to defraud St. 13 Eliz. c. 5
 any person or persons of their just actions are
 made void.

So that the Plaintiff has equal remedy in
 both cases: Suits for Dilapidations are most
 properly and naturally to be sued in the
 Spiritual Courts; and if any Prohibition F.N.B. 51.f.
 should be granted, the same ought to be
 super-

superfeded by a Consultation ; but this is intended where the Suit is grounded upon the Canon Law.

*Action upon the
Case at Law
for Dilapida-
tions.*

T. 8. H. 7. rot.

69. B. R.

T. 18 H. 7 rot.

69. C. B.

P. 12 & 13 H.

8. rot. 126. C. B.

M. 16 H. 8 rot.

306. C. B.

M. 12 H. 8. rot.

730. C. B.

H. 15 Jac. rot.

474. &c.

*The Custom up-
on which the
Action is
grounded.*

But the Successor may upon the Custom of England have a special Action upon the Case against the Dilapidator, his Executors or Administrators, whereof there are multitudes of Presidents even in the time of Popery, whereof the Reader has a taste in the Margin.

By all which it appears, that by the Custom of England, which is the Common Law; *Omnes & singuli Prebendarii, Rectores, Vicarii Regni Angliæ pro tempore existentes, omnes & singulas domos & edificia Prebendarum, Recto-
riarum & Vicariarum suarum reparare & sustentare, & ea Successoribus suis reparata & sustentata dimittere teneantur. Et si hujusmodi Prebendarii, Rectores & Vicarii Domus & Edificia hujusmodi Successoribus suis sic, ut præmittatur, reparata & sustentata non demiserunt & deliquerunt; sed ea irreparata & dilapidata permiserunt, Executores sive Administratores bonorum & catallorum talium Prebendariorum, Rectorum & Vicariorum post eorum mortem de bonis & catallis decedentium Successoribus talium Prebendariorum, Rectorum & Vicariorum, tantam pecuniæ summam quantam pro necessaria reparatione & edificatione hujusmodi Domorum & Edificiorum expendi aut solvi sufficiet, satisfacere teneantur.*

And upon this Custom, Actions of the Case have been frequently brought, both anciently and of later times, and Damages recovered.

See this Matter debated, and curious Learning thereupon. 3 *Levins* 268.

And

And note, That by a Statute made in fourteenth year of Queen Elizabeth, it is expressly enacted, *That all the Monies and Damages that shall be recovered for Dilapidations, are to be expended and laid out, in, and about the repair of the Houses, &c. dilapidated, wherein the Visitors of those Churches ought to take care.* St. 14 El. c. 11.

It will not be altogether improper to conclude this Chapter with the Statute of 35 E. 1. entituled, *Ne Rectores prosternant arbores in Cæmeterio*; whereby it is enacted, or rather the Common Law declared in these words:

We do prohibit the Parsons of the Church, that they do not presume to fell them (viz. the Trees in the Church yard) down unadvisedly, but when the Chancel of the Church wants necessary Reparations: Neither shall they be converted to any other use, unless the Body of the Church do want repair; in which case the Parsons of their Charity shall do well to relieve the Parishioners with bestowing upon them the same Trees, which we will not command to be done, but we will commend it when it is done. Against cutting the Trees in the Church-yard.

By this Law it appears, that the Church-yard and the Soil thereof is in the Parson, and by consequence the Trees are in the Parson or Rector, that grow therein. But because the Trees that grow there are for the most part planted there for the shelter and ornament of the Church from Tempest and Storms; therefore the Parliament has granted a Prohibition in this case against the Rectors and Parsons of Churches, that they should not cut down these Trees for any

any other use, but the necessary Repairs of the Church and Chancel, which in truth was no more than what the Common Law enjoyned: For if the Rector had gone about to have cut them down for any other use, the Patron might have had a Prohibition; but now I conceive the Rector or Improprator, that cuts down any Trees growing in the Church-yard for any other cause, than for the repair of the Church or Chancel, may be indicted and fined upon this Statute at the Common Law; for whatsoever may be prohibited before it is done, may be punished after it is done.

3 Inst. 205.:

If the Bishops and Archdeacons in their Visitations would take care, these Dilapidations might easily be avoided, which are a great dishonour to the Clergy, and cannot be pleasing to God Almighty or good Men:

And the Canon enjoyns the Archdeacons and other Officials, *Ut in Visitationibus Ecclesiarum faciendis diligentem exhibeant considerationem ad fabricam Ecclesiae & maxime Cancelli, si forte indigeant reparatione, & si quos invenerint defectus hujusmodi, certum sub poena praefigant terminum infra quem emendentur vel suppleantur, &c.*

Cap. Archidiaconi & infra.

C H A P. IX.

For what Causes a Parson, Vicar, &c. may be deprived by any Statute Law; and what matters are allowed for good Causes of Deprivation at the Common Law.

DEprivation or Deposition is, where a Man by any Statute Law, or by any Judicial Sentence Ecclesiastical, that hath proper Jurisdiction, is made incapable to hold or enjoy his Parsonage, Vicarage, or other Spiritual Promotion or Dignity: And the Causes of such Deprivation or Deposition, are properly and naturally determinable by the Ecclesiastical Laws of this Realm.

Deprivation and Deposition, what.

Where determinable.

But because generally there are Estates of Freehold dependant upon these Promotions and Dignities, and annexed to them inseparably, which rest at the sole determination of the Common Law; the Courts of Common Law do sometimes inspect and regulate the Proceedings of the Ecclesiastical Courts; and where they proceed against the Rules of Common Law, they frequently prohibit them.

I have therefore thought fit to shew, what causes of Deprivation or Deposition have been allowed and approved of by the Judges and Courts of the Common Law,

H

or

or by any of the Statutes of this Realm. But there are many more Causes of Deprivation by the Canons and Laws Ecclesiastical, which being out of my Profession, I shall not presume to discourse of.

2 Brownl. 37.

1 Brownl. 70.

Can. Apost. 42.

Mortimer vers.

Parker, 10 Jac.

*Simony cause of
Deprivation.*

2. If a Parson, Vicar, &c. be a common Drunkard, it is a just Cause to deprive him of his Church Preferment.

3. The Clerk that obtains any Preferment in the Church by any Simoniackal Contract or Agreement may be deprived by his Ordinary, &c. as it appears at large in the Fifth Chapter here before upon that Subject. *Supra.* 42.

1 Elc. 2. Stat.

14 Car. 2. c. 4.

*To use other
Forms of Prayer
the third
§. once.*

3. ' That if any Parson, &c. shall refuse
' to use the Book of Common Prayer, or
' administer the Sacraments in the order
' there prescribed, or shall wilfully and ob-
' stinately, standing in the same, use any
' other Rite or Ceremony, Order, Form or
' Manner of celebrating the Lord's Supper,
' or other open Prayers, or shall preach,
' declare or speak any thing in derogation
hereof, or depraving the same, or any
thing therein contained, and having for-
' merly been convicted for the like offence,
' shall upon his second conviction be depri-
' ved *ipso facto*.

St. 14 Car. 2 c. 4.

*Neglecting to
read Prayers
within two
Months after
Induction.*

4. ' If any Parson, Vicar, &c. shall not
' within two Months next after Induction,
' upon some Lord's day, openly, publicly
' and solemnly read the Morning and
' Evening

* Evening Prayers appointed to be read the same day, according to the Book of Common Prayer; and after such reading, shall not openly and publickly, before the Congregation there assembled, declare his unfeigned assent and consent to the use of all the things therein contained, in such manner as is directed before here in the seventh Chapter; and if there be any lawful Impediment, then if he do not do the same within one Month after the Impediment removed, such Parson, Vicar, &c. shall be deprived *ipso facto*.

5. * If any Parson, which shall have any Ecclesiastical Preferment, shall advisedly maintain or affirm directly any Doctrine contrary or repugnant to the 39 Articles of Religion, and being convented before the Bishop of the Diocese or Ordinary, or before the High Commissioners, shall persist therein, and not revoke his Error or after such Revocation shall estsoon affirm such untrue Doctrine, he may be deprived.

6. If any person shall obtain a Preferment in the Church, which is a * Miscreant, † Infidel, Schismatick or Heretick, he may be deprived.

7. So if one be made a Parson, Vicar, &c. that is not of free Condition, but a Villain, or that is illiterate and not able to perform his duty, or that is guilty of any heinous Crime, as Murther, * Manlaughter, Perjury,

13 Eliz. c. 12.

To maintain any Doctrine against the 39 Articles of Religion.

5 R. 2. tit. Trial

54. Miscreants, Infidels, Schismaticks and Hereticks deprived,

f. 3.

* A Misbeliever.

† An Acherst,

&c.

38 E. 3. 2. b.

Dy. 8. p. 254.

Co. 5. 58. a. 1.

Dy. 293. p. 1. 2.

Slave, Villain,

Illiterate and

Criminous

person may be

deprived.

* Hob. 121.

Roll. 2. Aibr.

221.

jury, Forgery, or that is *merè Laicus*, and not in Holy Orders, he may be deprived.

* And so is the
34th Canon of
the Apostles,
express.

Allen versus
Nash, P. 13.
Car. 1. B. R.
Cro. Jac. 37.
Non-conformity.
Quod nota.

8. * A Parson, Vicar, &c. may be deprived for being disobedient and incorrigible to their Ordinary, &c.

9. And it was resolved by all the Judges of England, 2 Jac. That Non-conformity was a good Cause of Deprivation: And it was declared by them all, That in case any Canons were made by the Clergy for the good Government of the Church, and approved and confirmed by the King, (as they ought) that the obstinate disobeying of them was a just cause of Deprivation.

11 H. 4. 37.
Taking a second Benefice.
Quære Stilling.
Eccl. Cases, 99.
100.

10. ' If any Parson, Vicar, &c. have one Benefice with cure of Souls, and take another incompatible without a Faculty and Dispensation, it is a just Cause of Deprivation.

Dyer 133. p. 1.
Priest to marry
was cause of
Deprivation.

Stilling. Eccl.
Cases, 86.

3 Inst. 204.
Co. 11 98. b.

2 H. 4. 3.

9 E. 4. 34.

20 H. 6. 36.

29 E. 3. 16, 17.

q. 4. Quicunque.

11. In the time of Popery it was Cause of Deprivation for a Priest to marry; but not to have two or three Concubines, as they called them: But more of this hereafter.

12. Dilapidating the Church and Buildings, destroying the Woods, or alienating the Lands belonging to the Church by any Bishop, Abbot, Prior, Parson, Vicar, &c. have been held and adjudged just Causes of Deprivation.

Deprivation; and it were very fit the Canons in this case were put in execution.

There may be a Question started, What shall be intended by the words, *Deprived ipso facto*; whether by those words the Church shall immediately become void by the fact done, or not till Conviction or Sentence declaratory. The words *Ipsa facto* are of late time crept into Acts of Parliament; as that for striking with a Weapon in a Church-yard, the party shall *ipso facto* be excommunicate: And in that case it is made a *Quære* in *Dyer*. But in *Green's Case* it is resolved, That the Church in this Case shall be void without any Sentence declaratory, and that Avoidances by Acts of Parliament need no Sentence declaratory. But in that Case by the Canonists, *requiritur Sententia declaratoria*. And note, That after Institution the Spiritual Court cannot deprive for any Error in his Institution. So if a Clerk commits Homicide, and hath his Clergy, he shall not afterwards be deprived for this offence. And a man may be deprived by reason of Degradation

Deprivation ipso facto.
See Taylor's
Ductor Dub.
475, &c.
1 Ventris 145.

Dy. 275. b. p. 48
Quære.
Co. 6. 29. b.
Cap. *Quia incontinentia*,
verb. *ipso facto*.

Rolls 2. 282.
f. 5.
Rolls 2. 305.
§. 3.

I must confess, in this Chapter I may seem to transgress upon the Canonists and Civilians, as well as in some other; but I have gone no further upon this Subject, than what I have met with in our own Books: And I must agree, That the Ecclesiastical Courts must have the sole Jurisdiction in all Causes of Deprivation, Depositions, Resignations, &c. And yet the Judges of the Common Law have power

to correct their proceedings, if they shall proceed against the Rules of the Common Law, which is the reason we meet with these things in our Books, and it may be some advantage to the *Civilians* to know how far the Common Law approves of their proceedings.

There are by the Canon Law divers other Causes of Deprivation; but it is out of my Province, and would be too long for this Discourse to reckon them all up. And having said what I have to say upon this Subject, I shall proceed next to shew, what Leases, Parsons, Vicars, and other Ecclesiasticks may make at this day of the Glebes, Tythes, Farms, &c. and within the danger of what Statutes they may fall.

Rolls 2. 282.
2. 345.

After Induction a Man cannot be deprived for any fault in his Institution.

Deprivation for Incontinency, *Croke Eliz.* 789. 41.

Deprivation for Adultery, *Co. 6. Rep.* 13.
Hob. 243.

C H A P. X.

What Leaſes Parsons, Vicars, and other Eccleſiaſtical Perſons may make of their Glebe, Tythes, Farms, &c. and within the danger of what Statutes they may fall.

HAVING undertaken this Work chiefly *What Leaſes*
 in favour of the Parsons and Vicars, I *Clergy-men*
 deſigned to have medled with no other Or- *may make.*
 ders of the Church but thoſe only; but ha-
 ving in many other things been enforced to
 intermingle the concerns of other Orders
 with thoſe of the Parsons and Vicars, I ſhall
 beg the Reader's pardon, that in this Chap-
 ter, where I am to treat of the Leaſes which
 may be made by Parsons and Vicars, I like-
 wiſe take in all other Orders of the Church
 with the Colleges; the Learning concer-
 ning Leaſes being of uſe, and neceſſary for
 all people to know, and which I ſhall in this
 Chapter put into as good a Method as the
 Subject matter will permit.

And becauſe the Learning of theſe Leaſes
 will depend upon Several Statutes, it will
 not be amiſs, firſt, to examine what Leaſes or
 Alienations the ſeveral perſons we have to
 do with in this Chapter, might have made
 at Common Law before the Statutes, and
 then to conſider where, or in what man-

ner, the several Statutes have enlarged, abridged, or restrained their power at Common Law.

At Common Law.

1 Inst. 45. a. 2.

And first, at the Common Law, no Bishop, Abbot, Prior, Dean, Prebend, or other single Corporation, could make any Alienation or Lease to bind their Successors, without the confirmation of their Chapter, Covent, &c.

The enabling

Act of 32 H. 8.
cap. 28.

The first Statute that made any alteration in these Cases, was the Statute of 32 H. 8. which is commonly called the Enabling Statute; whereby it is enacted,

‘That all Leases then after to be made
‘of any Mannors, Lands, Tenements or
‘Hereditaments, by Writing under Hand
‘and Seal, for term of Years, or for term
‘of Life, by any Parson or Parsons of the
‘full Age of Twenty one years, having
‘any Estate of Inheritance either in Fee-
‘simple or Fee-tail, in their own Rights, or
‘in the Right of their Churches, &c. shall
‘be good and effectual in the Laws against
‘the Lessors, their Wives, Heirs and Suc-
‘cessors.

‘Provided that that Act shall not extend
‘to any Lease of any Mannors, &c. where
‘any old Lease should be in being, unless
‘the same expire, be surrendred or ended
‘within one year after the making of such
‘new Lease, nor shall extend to any Grant
‘to be made of any Reversion of any
‘Mannors, &c. nor to any Lease of any
‘Mannors, &c. which have not most com-
‘monly been letten to Farm, or occupied
‘by

by the Farmers thereof, by the space of Twenty years next before such lease thereof made, nor to any Lease to be made without impeachment of Waste, or to any Lease to be made above the number of three Lives, or Twenty one Years at the most, from the day of the making thereof; and that upon the making of every such Lease there be reserved yearly, during the said Lease, due and payable to the said Lessors, their Heirs and Successors, to whom the Reversion shall appertain, &c. so much yearly Farm or Rent, or more, as hath most accustomedly been yielded and paid for the said Mannors, &c. so to be letten within Twenty years next before the Lease thereof made, &c.

Provided this Act should not extend to give any liberty or power to any Parson, Vicar, &c. to make any Lease, or Grant of any of their Messuages, Lands, Tythes, &c. or in any other manner than they should or might have done before the making of the said Act.

So now, where before the making of this Act, no Archbishop, Bishop, Archdeacon, Dean or Prebend, could have made any Lease to have bound his Successors without the confirmation and consent of their Chapters, &c. as aforesaid: Now by this Act they are enabled to make Leases for three Lives, or One and twenty Years, without any confirmation at all with these Qualifications:

What qualities such Leases may have.

1. Such

Must be in Writing indented.

1. Such Lease must be made by Writing Indented, and not by Parol or Deed Poll.

Must begin from the making, or day of making.

2. It must be made to begin from the making, or day of the making of such Lease.

Old Lease must expire within a year.

Co. 5. 2. b. 1.

Co. 1 Inst. 44. b.

3. If there be any old Lease in being at the time of the making of such Lease, it must expire, be surrendred or ended within a year after the making of such new Lease; and such surrender must be absolute, and not upon Condition.

Must not be a double Lease.

4. There must not be a double Lease in being at one and the same time, the one for Years, and the other for Lives.

Of what things such Lease may be.

Co. 5. 3. a.

More 738. 1.

Talentine vers.

Denton.

H. 2. Jac. B. R.

5. Such Lease must be of Lands manurable or corporeal, which are necessary to be letten, and out of which a Rent may be reserved, and not of things that lie meerly in Grant; as Fairs, Markets, Tythes, Tolls, Franchises, Advowsons, &c.

Of Lands usually letten.

6. Such Lease must be of Lands, &c. which have most commonly been letten to Farm; or occupied by the Farmers thereof for the more part of Twenty years before the making of such Lease: So if they have been so Let for Eleven years within Twenty years next before the making of the new Lease, it suffices: And a letting to Farm by Copy of Court-Roll, is a sufficient letting to Farm

Farm within this Statute, to enable the making of such new Lease. Co.6.37.

7. There must be reserved upon every such Lease, and payable during the continuance thereof to the Lessor, his Successors, &c. so much Farm or Rent as hath most accustomably been yielded and paid for the Land so demised within Twenty years next before such Lease made: So that it sufficeth, if the yearly Rent or Farm be reserved, though Heriots and other casual Services be omitted; so if a greater Rent than formerly be reserved, it sufficeth. But if the Lessor reserve a less Rent than the ancient, during his Life, and after the full Rent, yet it is naught, because it must be reserved during the whole Term: So if Lands usually letten be demised with any other Lands, &c. though a Rent be reserved that exceeds the value of those Lands and the old Rent; yet such Lease is not good against the Successor within this Law. But if the Rent were formerly reserved to be paid at four several days, and by the new Lease be reserved to be paid all at one, so the whole Rent be reserved yearly, it is well enough.

The accustomed Rent must be reserved.

Co.6.37.b.

Ibid. Co.5.6.a.

Co.1 Inst. 44.b.

Co.5.5.b.

Vide Co.8.70.
b. &c.

What Reservations are good.

Co.5.37.b.

If a Bishop, &c. have two distinct Mannors, that have anciently been demised together, and one entire Rent reserved for both Mannors; and these being out of Lease, the Bishop, &c. may demise them severally, reserving several Rents amounting to the whole ratably: And these have been Adjudged lately in the *Common Pleas* to be good, and

Trin. 26 Car.2.

C.B. Thred-

needle vers.

Linam.

H. 27 Car. 2. in
B.R. This Case
is put in the
modern Rep.
p. 203. but im-
perfectly re-
ported, *Ideo*
quare.

and affirmed in Error in the *King's Bench*; and by same reason, if a Termor for life should Lease part for years, and then surrender and accept a new Lease, rendring the ancient Rent, it would be a good Lease, *tamen quare*: For of that part leased by the Termor, there would be two Leases on foot together; but if the new Lease were only of the Lands not demised by the Termor, then it seems good.

*Such Lease
must not be
without im-
peachment of
Waste.*

8. Lastly, Such Lease must not be without impeachment of Waste; and therefore a Lease to one for life, remainder to another for life, remainder to a third for life, is not good against the Successor, though but for three Lives, because the Remainders make the present Tenants dispunishable for Waste for the time.

*Parsons and Vi-
cars excepted.*

But Parsons and Vicars being excepted in this enabling Law, are left as they were at the Common Law; so that they could make no Lease to bind the Successor without the confirmation of the Bishop and Patron, till the Statute of 13 *Eliz.* which we shall speak of hereafter.

Co. 8. 70. b.

And a Lease for 99 Years, if three Lives live so long, is not good within this Statute.

But this Act, as appears by what hath been said, conferred a new Power upon single Corporations; but did not in any thing restrain their ancient Power in making long Leases and Alienations of their very Scites, Demesnes, &c. with Confirmations

tions as aforesaid, which was a great prejudice to the Church in general, a means of Dilapidations, and a great hindrance of Hospitality: And therefore,

In the first year of Queen *Elizabeth* it ^{1 Eliz. c. 19.} was enacted, ' That all Gifts, Grants, Feoff- ^{More 107.} ments, Fines and other Conveyances and ^{Bishops restrained.} Estates from the first day of that present Parliament, to be had, made, done or suffered by any Archbishop or Bishop of any Honours, Castles, Mannors, Lands, Tenements, or other Hereditaments, being part of the Possessions of his Archbishoprick or Bishoprick, or united, appertaining or belonging to any the same Archbishopricks or Bishopricks, to any person or persons, Bodies Politick or Incorporate (other than the Queens Majesty, her Heirs and Successors) whereby any Estate or Estates should or might pass from the said Archbishop or Bishops, or any of them, other than for the Term of Twenty one Years, or three Lives, from any such time as any such Lease, Grant or Assurance shall begin, and whereupon the old accustomed yearly Rent or more shall be reserved and payable yearly during the said Term of Twenty one Years, or three Lives, shall be utterly void and of none effect, to all intents, constructions and purposes; any Law, Custom or Usage to the contrary thereof in any wise notwithstanding.

Note the Exception, which gives, or rather ^{1 Jac. c. 3.} reserves the power to grant, &c. to the Queen, &c. was made void by a Statute made ^{1 Jac.} And

*Leases in other
Forms not void,
but avoidable.*

Smalwood and
Sale verſ. l'E-
veſque Lich &
alios. P. 31 El.
rot. 21.65.
Co. 3.59.
1 Inſt. 45.2.
Cro. Jac. 95.

1 Eliz. A pri-
vate Act.
Co. 4.76.
Co. 5.2.b.
Cro El. 874.
More 253.

*Of what things
ſuch Leases may
be made.*
Co. 5.3.a.

More 778.
Sir Timothy
Tournour,
Serjeant le Roy.

See the Caſe,
Palmer 104.

And note alſo, that though this Statute enacts, That all Leases made in any other form ſhall be void and of none effect to all intent and purpoſes; yet it has been Adjudged, that it is only to be intended as againſt the Succeſſors, and that Leases made in other forms ſhall be good notwithſtanding againſt the party himſelf that makes them, and may be affirmed by the Succeſſor by the Receipt of the Rent reſerved thereupon.

And note, this is a private Act of Parliament, that muſt in all caſes be pleaded, and cannot be given in Evidence.

And not alſo, that though this Statute do not reſtrain demiſing of any Lands not formerly demiſed; yet it does it by implication: For the accuſtomable Rent muſt be reſerved, and unleſs accuſtomably let, there cannot be an accuſtomable Rent; and Leases within this Statute muſt have all the Reſtrictions in that of 32 H. 8. before-mentioned.

And it muſt be of things manurable, as hath been ſaid, out of which a Rent may be reſerved: But ſome are of Opinion, that Tythes or things not manurable may be demiſed for Twenty one years, becauſe an Action of Debt will lie upon the Contract: And ſo it was Adjudged, as a Serjeant at Law informed me, in the caſe of the Precentor of *Pauls* about 17 Jac. and that the Succeſſor ſhall have an Action of Debt upon this Contract, and is good within the Statute of 32 H. 8. cap. 28. And I have ſeen a Report of a Caſe in the 20 Jac. in the

Common

Common Pleas, that it was so Adjudged; and see *Leys Rep.* 76.: That *Yelverton, Williams* Cro.Jac. 112. and *Tanfild* were of the same Opinion, that it was good for years.

Upon this Statute, and the former, it has been held, That Archbishops and Bishops may with confirmation of the Dean and Chapter make concurrent Leases, that is, notwithstanding there be a Lease in being for Twenty one years, they may make a new Lease of the same Lands to another for Twenty one years from the making thereof; and this being confirmed as aforesaid, shall bind the Successor, the other things being observed in it: But Sir *Edward Coke* excepts the concurrent Leases, as to those other things. 1 Inst. 45 8.
Concurrent Leases.
More 65.
1 Inst. 45 a.

And Sir *Edward Coke* is of Opinion, That like concurrent Leases may be made by Deans, Prebends, &c. with Confirmation: But some Learned Men are not satisfied concerning concurrent Leases, because by these concurrent Leases the Successor loses his remedy for his Rent by distress during the former Term, and the Tenant may be insolvent as to an Action of Debt: But a concurrent Lease for Lives is not good, because upon such Lease the Lessor would have no remedy for his Rent. 1 Inst. 45. a.
More 253.
Cro. Eliz. 241.

The next Restrictive Law is that of 13 Eliz. ca. 10. whereby it is enacted, That from thenceforth all Leases, Gifts, Grants, Feoffments, Conveyances or Estates to be made, had, done or suffered by the Masters 13 Eliz. ca. 10.
The Restrictive Law against Leases of Deans, Prebends, &c.

' Masters and Fellows of any College,
 ' Dean and Chapter of any Cathedral or
 ' Collegiate Church, Master or Guardian
 ' of any Hospital, Parson, Vicar, or any
 ' other having a Spiritual or Ecclesiastical
 ' Living, or any Houses, Lands, Tythes,
 ' Tenements or other Hereditaments, being
 ' any part of the Possessions of any such
 ' College, &c. or any wife appertaining or
 ' belonging to the same, or any of them,
 ' to any person or persons, Bodies, &c. (other
 ' than for the Term of Twenty one years,
 ' or Three Lives, from the time as any such
 ' Lease or Grant shall be made or granted,
 ' whereupon the accustomed yearly Rent
 ' or more shall be reserved and payable
 ' during the said Term) shall be utterly
 ' void, &c.

Co 5.14.b.
 11 Co.75.b.

The penning of this Act, and that of
 1 Eliz. before-mentioned, being in effect
 the same in substance, the construction is
 the same in effect; but in this Act there
 was no saving of Grants to the King, and
 therefore this Act being for the publick
 Good, had restrained other Grants to him
 not warranted by this Statute, though 1 Jac.
 cap.3. had never been made.

*Parsons and Vi-
 cars restrained
 by this Law.*

And here note, That as the Parsons and
 Vicars had not their Power any wise en-
 larged by the Statute of 32 H. 8. so they
 had no restriction upon them till this Act;
 but from henceforth they are restrained
 from making any Lease or Grants, other
 than for Twenty one years or Three Lives,
 with the Qualifications above-mentioned
 in

in the Statutes, and such Leases must be confirmed by the Patron and Ordinary, because excepted in the enabling Statute of 32 H. 8. before.

And whereas after the making of this Statute, Heads of Colleges, Deans, Prebends, &c. might have made concurrent Leases, as well as Bishops might: There is a Proviso in the Statute of 18 Eliz.

‘That all Leases then after to be made by any the aforesaid Ecclesiastical, Spiritual or Collegiate Persons, or others of any of their Ecclesiastical, &c. Lands, &c. whereof any former Lease for years is in being and not expired, surrendered or ended within three years next after the making of any such new Lease, should be utterly void, frustrate, and of none effect, any Law, &c.’

18 Eliz.c. 11.
No concurrent Lease, but within three years before the former ends.

By this *Proviso*, it should seem, the Parliament was of Opinion, that concurrent Leases might be made; but has by this *Proviso* so restrained them, that they cannot be made but within three years before the Determination of the former.

But Bishops are conceived not to be comprehended within this *Proviso*; for though the words are general enough; yet the particulars mentioned before the general words being of an inferior rank, the general words cannot draw in the more worthy.

Bishops not in this Act.

I

And

*Which Bonds
and Covenants
shall be void.*

And there is a Provision in this Act of
18 El. ' That all Bonds and Covenants then
' after made for the making or renewing
' any Lease contrary to the intent of that
' Statute, or of the Statute of 13 Eliz. c. 10.
' should be utterly void.

13 Eliz.c.20.
*Leases of Parr-
sons to be void
by Non-resi-
dence.*

In the 13th year of Queen Elizabeth,
there is an Act of Parliament made, where-
by it is enacted, ' That no Lease made
' after the 15th day of May following, of
' any Benefice or Ecclesiastical Promotion
' with Cure of any part thereof, and not
' being impropriated, should endure any
' longer, than while the Lessor should be
' ordinarily resident and serving the Cure
' of such Benefice without absence above
' Fourscore days in any one year ; but that
' every such Lease [*so soon as it, or any part*
' *thereof, should come to any possession above fir-*
' *bidden, or*] immediately upon such absence
' shall cease and be void, and the Incum-
' bent so offending shall, &c. lose one years
' profit of his said Benefice, to be distri-
' buted by the Ordinary to the Poor of the
' Parish.

*These words
within the []
are repealed by
14 Eliz.c.11.*

*Charging Par-
sonages, void.*

And by the same Statute it is further
enacted ' That all charging of such Bene-
' fices with Cure then after with any pen-
' sion, or with any profit out of the same to
' be yielded or taken, other than Rents re-
' served upon Leases, should be void.

*Where a Parson
may demise, and
be Non-resident.*

' But where any Parson should be quali-
fied to have two Livings, he may demise
the one of them, where he is not ordina-
rily resident, to his Curate only, that shall
' there

‘ there serve the Cure. And such Lease shall
 ‘ endure no longer than during such Curates
 ‘ residence without absence above Forty days
 ‘ in any one year.

And by 14 *Eliz.* it is enacted, ‘ That all ^{14 *Eliz.* 11.}
 ‘ Leases, Bonds, Promises and Covenants, of ^{Leases, Bonds}
 ‘ and concerning Benefices and Ecclesiastical ^{and Covenants,}
 ‘ Livings with Cure to be made by any ^{to be void.}
 ‘ Curate, shall be of no other or better
 ‘ force, validity or continuance, than if the
 ‘ same had been made by the beneficed per-
 ‘ son himself, that shall demise the same to
 ‘ such Curate.

And by the same Statute it is enacted, ^{Houses, Incorporations, &c.}
 ‘ That the restrictive Statute of 13 *Eliz.* ^{how to be lea-}
 ‘ c. 10. before, shall not extend to any Grant, ^{sed.}
 ‘ Assurance, or Lease of any Houses be-
 ‘ longing to any the persons, &c. in the said
 ‘ Stat. of 13 *El.* nor to any Grounds to any
 ‘ such Houses appertaining, &c. in any City,
 ‘ Borough, Town Corporate, or Market
 ‘ Town, or the Suburbs of any of them ;
 ‘ But that all such Houses and Grounds may
 ‘ be granted, demised and assured, as they
 ‘ might have been before the making of the
 ‘ said Act, so always as such House be not
 ‘ the Capital, or Dwelling house used for
 ‘ the Habitation of the Parsons, &c. nor have
 ‘ above ten Acres to the same.

‘ Provided, That no Lease be made by ^{Not to lease in}
 ‘ virtue of this Act in reversion, nor with- ^{Reversion.}
 ‘ out reserving the accustomed yearly Rent
 ‘ at least, nor for a longer Term than Forty
 ‘ years at most, charging the Lessee with
 ‘ Repairs, and no alienation in Fee, unless
 ‘ Lands

Lands of as good yearly value be settled, &c. in lieu thereof.

Bonds, Con-
tracts, Cove-
nants, Promises,
where to be
void,

There is likewise another *Proviso* in this Act, ' That all Bonds, Contracts, Promises, and Covenants, to be made for the suffering or permitting any person to enjoy any Benefice or Ecclesiastical Promotion with Cure, or to take the profits or fruits thereof, other than such Bonds and Covenants as shall be made for assurance of any Lease heretofore made, shall be of no other force than Leases made by the same person.

13 Eliz. c. 11.

And by another Statute made in the 18th year of the same Queen *Elizabeth* it is enacted, ' That after Complaint made to the Ordinary, and Sentence given upon any Offence committed by the Incumbent against the Statute of 13 *Eliz. c. 20.* where by he shall or ought to lose a years profit of his Benefice, &c. That then the Ordinary within two Months after such Sentence and Request made by the Churchwardens of the Parish, where, &c. or one of them, shall grant the Sequestration of such profits to such Inhabitant or Inhabitants within the same Parish, &c. as to him shall seem meet, &c.

Every Parishioner may take advantage.

And that upon default of the Ordinary it shall be lawful for every Parishioner, &c. to retain, &c. his Tythes, and for the Churchwardens to enter upon the Glebe land Rents and Duties of every such Benefice to be employed to the use of the Poor, &c. until such time as Sequestration shall

shall be committed, by the Ordinary ; and then the Churchwardens and Parishioners to account to such to whom the Sequestration shall be committed, who is to employ the whole Profits according to the Act, upon pain to forfeit the double value of the Profits withholden, to be recovered in the Ecclesiastical Court by the Poor of the Parish.

Having thus for the Reader's satisfaction given him an Abstract of all the Statutes concerning the Leases of Ecclesiasticks of all kinds, I shall briefly sum them all up, and proceed to take a view of such other Statutes as the Parsons, Vicars, &c. are in any manner in danger of.

Upon the whole matter it appears, that *What Leases may be made by Bishops and Archbishops.* Archbishops and Bishops may make Leases for Twenty one years, or for one, two or three Lives, with the qualifications before-mentioned without any Confirmations at all : And they may make concurrent Leases for Twenty one years, upon Leases for Twenty one years from the making, with confirmation of the Dean and Chapter, with such Qualifications as is aforesaid, though there be above three years in being of the old Lease at the time of the making the new ; and where the Bishop has two Chapters, there the concurrent Lease must be confirmed by both Chapters ; unless it be as it was in the Bishop of *Waterford's* Case, which was thus :

Co 17.71.2.

The Bishop of *Waterford* had long ago the Bishoprick of *Lismore*, and the Chapter united to that of *Waterford* : And in all Grants made of the Lands belonging to *Lismore* that Chapter only confirmed, and all Grants made of the Lands anciently belonging to the Bishoprick of *Waterford*, the Chapter of *Waterford* only confirmed : And because the Union was not extant, all the Judges held the confirmation of the one in manner aforesaid was good ; for it shall be intended, that it was so provided for upon the consolidation : But otherwise all the Judges held, That both Chapters ought to have confirmed.

Ibid.

But if a Bishop had two Chapters, and one of them surrenders, is suspended or dissolved, the confirmation of the other suffices.

M. 14 & 15 El.

There is a Case in Mr. Justice *Harper's* Reports, where the Case is put, That a Bishop made a Lease dated 2 *die Maij*, confirmed the third day, and sealed the fourth day of *May*, and held a good Lease and well confirmed.

Harpur's Rep.
ibid.

But a confirmation by the Dean and Chapter after the death of the Bishop, comes too late, by *Cataline*, *Southcoate* and *Windham* against *Wray*.

T.6.El.Mo.66.

But if a Bishop make several concurrent Leases, and the latter is first confirmed, and after the first is confirmed ; in this case the first Lease shall be preferred, because nothing passes by the confirmation in point of Interest, but a meer consent.

If

If a Bishop make a Grant to the King, which is confirmed by the Dean and Chapter before the Grant is inrolled; this is well enough.

T. 8. Jac. Scac.
Sir Edw. Dymock's Case.
Rolls 1. 477.
h. 7.

But Note, That a Bishop cannot make a concurrent Lease for life, though upon a precedent Lease for years; nor a concurrent Lease for years, where there is a Lease for life in being.

Cro. El. 141.
More 253.

Deans, Prebendaries, Heads of Colleges, Masters of Hospitals, and other Ecclesiastical Persons mentioned in the Statute of 13 Eliz. c. 10. may make Leases for 21 years, or any lesser number of years, or for one, two or three Lives in possession, according to the Qualifications above-mentioned; and they may make concurrent Leases as Bishops may with Confirmations; but they must be within three years of the determination of the former Term by expiration, surrender, or otherwise: So that in this point the Bishop has the advantage.

Leases by Deans
Prebends, Colleges, &c.

18 Eliz. c. 10.

And though the Enabling Statute of 32 H. 8. gives power to make Leases, to hold from the making or day of the making; yet the Restrictive Statute of 13 Eliz. makes them void, if they be not made to hold from the making, and not from the day of the making; *quod nota*: But the Leases of Bishops and Archbishops are not within that Act; but the Act of *primo* of the Queen is, That all Leases should be void, other than for 21 years or three Lives from the time of the commencement. Note the different Pennings.

13 Eliz. c. 10.

Concurrent

*Leases and who
is to confirm
Leases.*

3 Rolls 481.

p.q.r.

Dy. 221. p. 18.

317. p. 42.

Plow. 528.

Dyer 61. p. 30.

Co. 5. 81. a..

*Who are to con-
firm Leases.*

And forasmuch as all concurrent Leases of a Bishop, Dean, Prebend and Archdeacon are to be confirmed, it is convenient to let the Reader know who is to confirm the same; therefore for the Reader's satisfaction, he is to know that the Leases of Bishops and Archbishops are to be confirmed by the Dean and Chapter, or Deans and Chapters, if there be several Chapters.

Grants made by a Prebend, are to be confirmed by the Bishop, Dean and Chapter.

The Grants made by Deans, are to be confirmed by the Bishop and Chapter.

The Grants made by the Archdeacon, by the Bishop, Dean and Chapter.

The Grants of Parsons and Vicars, with their Patrons and Ordinaries.

And Grants by the Incumbent of a Donative, by the Patron alone.

But if a Parson make a Lease, which is confirmed by the Bishop only, who is Patron, without the Dean and Chapter, which ought to have joyned, it shall bind the Successor during the Lives of the Bishop and Incumbent, although the Bishop be translated.

But Grants by Parsons, Vicars, Prebends, &c. before Induction or Installations, &c. although confirmed, are not binding to the Successor.

But if the King be Patron of a Prebend, then the King and Dean and Chapter, and not the Bishop, ought to confirm the Grant.

A Lease made by a Prebendary Parson, Vicar, &c. may be confirmed for part of the Term, if it be for years, that is, confirm the Land to the Lessee for so many years of the Term; but if the Term be confirmed for part of the Term, it were absurd and repugnant, and should be good for the whole Term: And as such Lease may be confirmed for part of the Term, so it may be for part of the Land.

If a Parson, &c. make a Grant, which is confirmed by the Patron and Ordinary, and after be deprived; yet the Grant is good.

A Husband seised in the right of his Wife of an Advowson, the Parson makes a Lease warranted by the Statutes before-mentioned, and the Bishop and Husband confirm it; this shall not bind the right of the Wife but during the Husband's life, but that the Successor after his death will avoid it, that comes in by the Presentation of the Wife.

So if Tenant in tail, being Patron, confirm the Grant of the Parson with the Bishop, this shall not bind the Incumbent of the Issue in tail.

If an Usurper present, and confirm the Lease of his Incumbent with the Bishop, and after is removed by *Quare Impedit*, &c. this shall not bind the Clerk of the true Patron.

If the true Patron grant the next Avoidance, and then confirm the Grant of the Parson, who after dies; the Incumbent presented by him that had the next Avoidance shall avoid the Lease, and his very entry upon the Lessee avoids the Lease for ever.

If

Co. 5. 81. a.
Dyer 72 a. b.
Cro. El. 472.
Dyer 52. b.
338 b.
Vid. Lit. §. 524.

1 Rolls 476.
f. 1. 2.

Ibid. 479. n. 1.

Ib. 480. n. 2, 3.

Ibid. n. 4.

Cro. Car. 582.

1 Rolls 480.
n. 5.

Co. 1 Inst. 46. a.

Cro.El.430.

If a Parson makes a Lease to the Patron which is confirmed by the Bishop, this is not good; but if the Patron grants it over, it amounts to a Confirmation.

Co 5.15.a.

1 Roll.48 l.p.1.

If a Prebend, Parson or Vicar make a Lease, and the Bishop being Patron, confirms it without the Dean and Chapter; yet this shall bind the Bishop and all the Prebends, Parsons, &c. which he shall Col- late.

Cro.El.18.

If a Parson had made a Lease for above 21 years before the Statutes of 13 and 14 Eliz. which had been confirmed after; this had been good, and not within the restriction of those Laws.

1 Leon.233.

Quære.

If a Parson leases where there are two Patrons, both ought to confirm, as should seem.

Cro.Car.38.

If the Patron and a succeeding Bishop confirm the Lease of the Parson, it is good enough.

Dy.106.p.21.

Quære.

A Prebend made a Lease, reciting that it was with the consent of the Bishop, who signed and sealed the Lease to the Lessee, but was no party to the Deed, *Quære* if good.

And having said thus much of Confirmations, let us see, what Leases a Parson or Vicar may make at this day, considering all the before-mentioned Statutes.

Leases by Parsons and Vicars.

And first, it is to be observed, That at and by the Common Law a Parson or Vicar might have granted or charged his Glebe in Fee-simple, with the confirmation of the Patron and Bishop; but being excepted out of

of the Enabling Statute of 32 H. 8. he ^{32 H.8.c.28.} could never make any Lease or Grant to bind their Successors, without such Confirmation; then by the Statute of 13 Eliz. ^{13 Eliz.c.10.} Parsons and Vicars are restrained: So that they cannot grant but for 11 years, or three Lives from the making of such Lease, and not from the day of the making, as is before observed; and these Leases and Grants must be with the confirmation of the Patron and Ordinary, with all the Qualifications expressed in the beginning of this Chapter.

And it should seem, they may make concurrent Leases, as Deans, Prebends, &c. may do within three years of the end of the former Leases.

It has been a Question, Whether a Parson or Vicar at this day can make any Lease at all to bind his Successor?

For by the Statute of 13 Eliz. cap. 20: it ^{13 El.cap.20.} is enacted, *That Leases of Parsons, Vicars, &c. that have Cure of Souls, shall endure no longer than they shall be ordinarily resident and serve the Cure; and that if such Parson, &c. shall be absent from their Cure above Eighty days in one year, that then such Lease shall cease and be void.*

Now when a Parson dies, and 80 days incur, and this being a Law for the advancement of Religion and Hospitality, to avoid Dilapidations, it shall have an equitable construction for the preferring these ends: Therefore some have held, That the death of the Parson, Vicar, &c. after 80 days have incurred

*Parson Leases,
which is con-
firmed, and
pies.*

incurred from their deaths, shall make all their Leases and Grants void, though never so sufficiently confirmed; and rely very much upon the Preamble of the Statute, which begins, *That the Livings appointed for Ecclesiastical Ministers, may not by corrupt and indirect dealings be transferred to other uses; Be it enacted, &c.* But by these Leases it is apparent the Profits are converted to other uses, &c.

But others have held the contrary Opinion, because such absence is not voluntary, but by the Act of God, and regularly these cannot be said absent that are not in esse.

Cro.El.127.

More 270.

And though Croke report *Mott and Hale's* Case adjudged in point, that their Leases are void by death; yet *More* reporting the same Case, says, *As to the matter in Law the Judges were divided two against two, and that the Judgment was given upon a misrecital of the Statute.*

*Bayley versus
Munnes.*

T. 24 Car.2.

B.R. Quære.

Dy.372.p.11.

And this Point, as I am informed, came lately in question in the *King's-Bench*, and was adjudged, that death doth not avoid such Leases. *Ideo quære inde.*

*When Parsons
Leases shall be
void by Non-
residence.*

There is a *Quære* in *Dyer*, Whether such Leases shall be void upon 80 days absence *ab initio*, or but from the time of absence by 80 days; but it seems to me with some clearness, that it shall only be void from 80 days absence, and not *ab initio*.

For first, the words of the Statute are, *That such Lease shall endure no longer than the Lessor shall be ordinarily resident, &c.* So that
till

till then it is to endure; and the Statute closes, That upon such absence the Term shall cease, which it could not do, if it had not a being before; for a thing cannot cease to be, that has not been. Dy. 177. p. 31. Quere.

But another *Quere* may be started in this Case, upon the reason in *Lincoln-College Case*, Whether such Lease shall be void against the present Incumbent that made it, or only against his Successors? *Whether void against the Parson himself. Co. 3. 59. b. 60. a.*

But it seems to me with some clearness, that the intent of the Makers of this Act was to make such Lease void against the Lessor himself upon such absence: For, as before is said, the Statute says, *It shall endure no longer*, which is a term of limitation, and that immediately upon such absence the Lease shall cease and be void; and it cannot cease immediately upon the absence, and yet be good during the life of the Incumbent. *And there has been some late Opinions, as I have heard, against the Resolution in Lincoln College Case.*

But in the Case of *Revel versus Hart*, Dy. 372. p. 111.
H. 43 Eliz. B. R. the Court held the contrary, as my Reporter says. *Ideo quere.* Quere.

If any Parson, Vicar, &c. be suspended, inhibited, or disabled to serve the Cure by the space of 80 days in a year; this shall not make such Lease void, for the not serving the Cure must be voluntary. *Dobbins versus Gerrard. P. 39 El. B. R.*

And it has been held, That if a Parson be resident, and do not serve the Cure, or serve the Cure and be absent by 80 days, that in both these cases it will make such Lease void.

Though

Though this Statute upon Eighty days absence makes such Lease void made by Parsons and Vicars, and says nothing of Confirmation; yet a Confirmation of the Patron and Ordinary in this case seems not to amend the matter; for if the Lease be void, the Confirmation is of no avail.

St. 28H 8.c.11.
Parsons Leases.
and Resigni.

At the Common Law, If a Parson, Vicar, &c. had made a Lease and resigned, the next Incumbent might have entred immediately upon the Lessee.

But by a Statute made in the 28th year of H. 8. *the Lessee may hold on his Term for six years, if the Parson that made his Lease so long live, and the Term were made for so long time; but upon such Lease there must be so much Rent reserved within Forty shillings as such Benefice in valued at in the King's Books.* See the Statute at large.

And by the same Statute, *If a Parson make a Lease and resign and dies, the Tenant shall hold out his Lease for the year that was commenced at the time of his death, if the Term were to have had so long continuance, if the Parson had not died.*

But this seems only of such Lands as are ploughed; for the succeeding Parson is to have the Parsonage-House and Glebe, which is not sowed within a Month after he is Inducted, allowing a reasonable deduction for the Rent reserved upon such Lease.

But in both Cases the Lessee must pay the reserved Rent to the succeeding Incumbent, who is enabled to sue or distrain for the same.

And such Lease must be in writing under Hand and Seal, and not by Parol.

But it should seem the Statute of 13 *Eliz.* 13 *Eliz* c. 20. before has made this Law of none effect.

And having now done with these Statutes, as to Leases, let us next consider what Bonds, Covenants, Promises, &c. are void within the Statute of 18 *Eliz.* before-men- 18 *Eliz* c. 11. tioned.

Covenants, Bonds, &c. made for the Hob. 269.: enjoying Houses within Cities, Corpora- Covenants, tions, &c. are not void within this Law; Bonds, which for this Law makes no Bonds, Covenants, good. &c. void, which are not against the intent of this Statute and the Statute of 13 *Eliz.* cap. 10. but Leases of Houses and Lands in Cities, &c. by the Statute of 14 *Eliz.* cap. 11. are exempted out of 13 *Eliz.* cap. 10. and are not within the Statute of 18 *Eliz.* before.

A Parson made a Bond to resign upon request, and afterwards a Lease to his Patron of part of the Glebe for Twenty one years: In an Action brought upon this Bond, the Incumbent pleaded the Statute of 18 *Eliz.* and averred, that this Bond was made to secure this Lease, and to compel the Incumbent to reside, and adjudged a good Plea, and an apt Averment. More 641.:

Cro. El. 489.
Noy 66.

A Parson made a Lease, and in the Lease covenanted, Not to be absent by the space of 80 days in any one year, and gave Bond for the Performance, and after became Non-resident for 80 days; and resolved, That the Bonds and Covenants were both void.

Olivers Case,
M. 4. Jac. B.R.

A Parson made a Lease, and covenanted Neither to do, or suffer to be done, any matter whereby the Lease should become void, and after became Non-resident by the space of 80 days in a year; and this was held a good Covenant; and a Covenant, That the Parson should be resident, was held not to be against this Law, by *Popham, Tanfield* and *Clench*, against *Williams*. *Idea quare.*

Quære.

Leases of Colleges,
Hospitals,
&c.

And having now done with Leases to be made by Ecclesiasticks of every kind, and having therein exceeded my bounds beyond Parsons and Vicars to all other Ecclesiasticks, since the Leases of Colleges and Hospitals come in my way, I will give the Reader what satisfaction I can concerning them: And as to them,

13 Eliz. c. 10.

It is to be observed, That they are not comprehended in the Enabling Statute of 32 H. 8. nor in any other Statute that I find, till the Restrictive Statute of 13 Eliz. whereby (amongst the rest) the Masters and Fellows of Colleges, and the Masters and Guardians of Hospitals, are disabled to make any Grants or Conveyances of any of their Possessions, other than for Twenty one Years, or three Lives, from the making of such

such Lease, and not from the day of the date, or from the date, as has been said : And this must be of Lands usually demised, and the accustomed Rent, or more, must be reserved with all the other Qualifications mentioned in the beginning of this Chapter.

But there is a Restriction upon Colleges Stat. 18 Eliz. 1 by the Statute of 18 *Eliz.* that upon all College Leases, a third part of the ancient Rent shall be reserved in Wheat and Malt, after the rate of 6 s. and 8 d. a Quarter Wheat, and 5 s. a Quarter Malt, to be delivered at the Colleges ; and in default of the delivery to pay for the Wheat and Barley, after the rate the best Wheat and Malt shall be sold the next Market-day before the Rent should have been paid, and for default of such Reservation the Lease to be void ; and the Markets that are to set the Prices are, *Oxford* for *Oxford*, *Cambridge* for *Cambridge*, *Windsor* for *Eaton*, *Winchester* for *Winchester*.

And by the Statute of 18 *Eliz.* they are 18 Eliz. c. 11. restrained to make any concurrent Leases till within three years of the end of the former Terms that are in being.

I shall now shew the Reader what things are demisable within these several Statutes, and what Reservations are good, and in what case the Acceptance of Rent by the Successor will make a Lease good, that was What Leases shall be good. voidable within these Laws, and the several Qualifications mentioned in the beginning of this Chapter.

Small's Case.
M.4.Jac B.R.
*Former in be-
ing.*

One *Small* being possessed of the Man-
nor of *Paddington*, by a Lease from a Bishop
for a Term of years, the Bishop made a
Lease to another for three Lives, and before
Livery the Tenant surrendered his former
Term; and it was held that the Surrender
was made in due time, and the second Lease
good.

Cro. Jac. 458.
3 Bulster. 290.
*More in the
new Leases,
than in the
old.*

A Prebend had usually been leased (ex-
cepting the Crabtrees,) and that the Pre-
bendary make a new Lease without ex-
cepting the Crab-trees, reserving the ancient
Rent, with other due circumstances; and
this Lease was held void against the Suc-
cessor, by reason of the adding of the Crab-
trees.

Co. 5. 15 a.
*Next Avoid-
ance not demi-
sable.*
Co. 10. 60. b.

It hath been adjudged, That a Bishop,
Dean, &c. cannot grant the next Avoidance
of an Advowson, nor any Rent-charge
out of the Possessions of the Church; but
the same is void within the restrictive Acts
before-mentioned, though these cannot
be said any of the Possessions of their
Churches.

Davenant vers.
Evesq; Sarum,
M. 24 Car. 2.
B. R.
2 Levins. 68.

And it hath been held, That where a
Bishop demised a Rectory for Lives, and
covenanted to discharge, same harmless, and
indemnify the Lessee, &c. from all Pen-
sions, Procurations, Subsidies, and from all
other payments of any Sum of Money, De-
mands and Duties whatsoever, ordinary or
extraordinary, which shall be due and iss-
uing out of the Premises; that this Covenant
would not bind the Successor, unless it had
been in the ancient Leases.

And

And the Lord Chief Justice *Hale* was of ² *Levins* 68. Opinion, That such Covenant, though it ³ *Keeble* 69. had been in former Leases, should not bind the Successor for the Royal Aid, or any new Charge by Act of Parliament.

But a Bishop may grant an ancient Office *Co. 10. 61. b.* with the ancient Fee (if it be a necessary Office, for the life of the Officer :) But the Bishops cannot grant such Office to two, or in Reversion.

And a Bishop cannot grant an Annuity, *pro consilio impenso & impendendo*, to bind his Successor, though it be confirmed by the Dean and Chapter.

And it hath been Resolved, That a Bishop of late erection may grant an Office of necessity to one in possession for life, with a reasonable Fee. *Co. ib. b.*

But these Grants must be all confirmed by the Dean and Chapter, because they are not good within the Statute of 32 H. 8.

But where Offices have anciently been *Co. 10. 62. a.* granted in Reversion, they may still *Cro. Car. 555.]* be granted in Reversion with Confirmation.

If a Bishop grant an ancient Office with *Evesq; Chich.* the ancient Fee and more, and the Grant be *verf. Freedland.* entire, (as where the ancient Fee was five *Leys Rep. 72.* Marks, and the new five Pounds,) 'tis void for all. But if it be several, (as five Marks, and Pasturage for two Horses,) it is good for the ancient Fee, and void for the other,

per Hatton and Yelverton versus Crook and Harvey.

Collyns and Jones's Case, Ley 80.

If a Copyhold Escheator be forfeited, the Bishop may grant it in Fee by Copy of Court-Roll, notwithstanding the Statute of 1 Eliz.

Co. 5. 15. a. Charges void.

It was also Resolved, That where an Archdeacon made a Lease for three Lives, warranted by the Statutes before-mentioned, and the Lessee granted a Rent-charge for an hundred years, which was confirmed by the Bishop, Dean and Chapter; that notwithstanding the same was void against the Successor within the Statute of 13 Eliz. cap. 10.

Co. 5. 14. b.

If a Wait of Annuity should be brought against a Parson, &c. pretending the same due by Prescription; and although the Parson pray in aid of the Patron and Ordinary, and upon a Plea pleaded by them, the Plaintiff obtains Verdict and Judgment, and all this by practice and fraud to charge the Glebe, it is void against the Successor: For these Statutes being made for the benefit of the Churce, advance of Religion and Hospitality, and to avoid Dilapidations, shall always have a favourable Construction.

19 Aff. p. 9.

Acceptance of Rent, where it shall bind.

It is regularly true, that where the Wife, Issue in tail, or Successor, accepts the Rent after the death of the Husband, Tenant in tail, or a Predecessor, upon a void Lease made by the Husband, Tenant in tail, or Predecessor, that such Acceptance will not affirm the Lease.

But

But this Rule must be understood of such Lease as is void *ipso facto*, without Entry or any other Ceremony; and therefore if

Parson, Vicar or Prebend, &c. make a Lease not warrantable by the Statutes for Twenty one years, rendring Rent, and dies; here no Acceptance of Rent by the Successor, &c. will affirm this Lease, because the same was void without Entry or other Ceremony.

Herley 88.

Co. 3. 65. a.

35 H. 6. 3 & 4.

11 E. 3. Fitz.

Abbot 9.

8 H. 5. 19.

But if a Parson, Vicar or Prebend, make a Lease not warrantable within the before-mentioned Statutes for life or lives, rendering Rent, and die, and the Successor before Entry accept the Rent; this Lease shall bind him for the time: For this being an Estate of Freehold, could not be void before Entry.

But if a Bishop, Abbot or Prior, which have the Inheritance in Fee-simple in them, make a Lease for lives, or years not warranted by the Statutes before-mentioned, not being absolutely void by their deaths; but only voidable by the entry of the Successor, if the Successor accept the Rent before Entry, be it for lives or years, he affirms the Lease for his Life.

Dy 239. p. 42.

F.N.B. 50. c.

If a Bishop make a Lease not warranted by the Statutes, rendring Rent, and die, and his Successor appoints his Bailiff to collect his Rents of that Mannor, who amongst the rest receives the Rent reserved upon this Demise, and accounts to the Bishop's Successor for it; this is a good Acceptance, and shall bind the Bishop for his time.

1 Rolls 476. d.

11 E.3.F.Ab.
bot 9.
Dy. 239.p.42.
2 H 4. 2. 1.

So if a Parson lease for life not warranted nor confirmed, reserving Rent, if his Successor receive Fealty of his Tenant upon this Lease, he has thereby affirmed the Lease for his time: The like it will be, if the Successor bring an Action of Waste.

Cro. Jac. 273.

But if a Bishop make a Lease of Tythes or other things not manurable, for life or lives, rendring Rent, and dies, and his Successor accepts this Rent, it will not affirm the Lease.

Quere.

But whether such Acceptance upon a Lease for years of Tythes, &c. will bind the Successor; I must leave it a *Quere*, not finding that Point any where resolved.

I having now held the Reader long upon this Subject, I shall now leave them, and proceed to Examine, what Leases or Farms they may with safety take, or not take.

St. 21 H 8. c. 13.
Parsons, &c.
must not take
Farms.

By a Statute made in the Twenty first year of King *Henry* the Eighth, it is amongst other things enacted, 'That no Spiritual person shall in his own Name, or in the Name of any other, take to Farm any Mannors, Lands, Tenements, or Hereditaments, upon the penalty of Ten pounds for every Month that he holds the same; nor by himself, nor any other, shall buy Cattle, Corn, Lead, Tyn, Hydes, Leather, Tallow, Fish, Wooll, Wood, or any manner of Victuals or Merchandizes, to sell again for gain, upon pain to forfeit the treble value of things so bought.

' But

‘But a Spiritual person may buy such things for his own use, and if they do not fit him, he may sell the same again; and so where he hath not sufficient Glebe, he may take Grounds for the maintenance of his Family.

Where he may.

And it is further enacted by the same Statute, ‘That no Spiritual person beneficed with Cure of Souls, shall Farm the Parsonage or Vicarage of another to take any Rent or Profit out of such Farm, upon the penalty of Forty shillings a Week, and ten times the value of the Rent, or Profit he shall take out of his Farm.

Shall not farm anothers Parsonages, &c.

And it is further enacted by the same Statute, ‘That no Spiritual person shall have or keep by himself, or any other, any Tan-house or Brew-house, other than for his own Family, upon pain to forfeit Ten pounds *per menssem*.

Must not keep a Tan-house or Brew-house.

‘All which Penalties are given to the King and Informer, to be recovered in any of his Majesty’s Courts of Record at Westminster, by Action of Debt, Bill, Plaint, or Information, wherein no Effoin, Protection, or Wager of Law is to be admitted, &c.

Penalties, how to be recovered.

M. 4 Car. 1 Scaccario, It was Adjudged, That a Spiritual person, not beneficed, was not within this Statute.

Cragge versus Lampley, M. 4 Car.

By the Statute of 5 Eliz. there is ‘Authority given to the Bishop of the Diocese, Parson, Vicar, or Curate of the Parish, to license any sick person to eat Flesh during his sickness; and if his sickness continue above Eight days after the granting of

5 Eliz. cap. 5. Where he may license the eating of Flesh.

‘ such Licence, then the same is to be Registered in the Church-Book, &c. and that
 ‘ Licence to endure during the Sickness, and
 ‘ no longer.

*Penalty, if
 needless.*

‘ And if any Parson, Vicar or Curate,
 ‘ grant any Licence to any person or persons,
 ‘ other than such as evidently appears to
 ‘ have need thereof by reason of sickness,
 ‘ the Parson, Vicar or Curate, that granted
 ‘ such Licence, shall forfeit five Marks for
 ‘ every such Licence, and the Licence to be
 ‘ void.

Sheep.

*Stat. 25 H. 8.
 cap. 13.*

In the 25th year of Henry the Eighth there was a Statute made against the excessive number of Sheep; wherein there is
 ‘ a *Proviso*, ‘ That it might be lawful to all
 ‘ Spiritual persons, and every of them, to
 ‘ keep such, and so many Sheep upon their
 ‘ own Lands, and after such form and manner, and not otherwise, as they might
 ‘ have done before the making of the said
 ‘ Act.

Incontinence.

There are several Acts of Parliament for punishing Incontinent Priests, which though since the blessed Reformation (I do not mean the last pretended Reformation; but that in the time of Edward the Sixth and Queen Elizabeth) are become obsolete and useless: Yet since I have promised them all the Statutes they may fall in the danger of, these are not to be admitted.

But before I come to those particular Laws, I will beg the Reader's pardon for giving him a short Historical account of the restriction of the Marriages of Priests, which gave the occasion of these Laws.

Bellarmin

Bellarmin in his Disputations endeavours De Clericis, to make the single Life of Priests to be *Jure* cap. 18, 19.
Divino; but if not so, yet he goes about to

prove that it has been enjoined by Canons as high as the Apostles time: And to that purpose vouches the Canons of the Apostles (which though they may be ancient, yet no rational Man that peruses them, will believe they were made by the Apostles, or very near their time) in which I must confess I find a Canon that by implication forbids Priests to marry, but not married Men to be Priests; and 'tis to this effect: *Ex his* Canon 25.
qui calibes in Clerum pervenerunt, jubemus, ut Lectores tantum & Cantores (si velint) nuptias contrahant.

But if had look'd a little back in those Canons, he would have found another manner of Prohibition in these words: *Episcopus aut Presbyter, aut Diaconus, uxorem suam* Canon 5.
prætextu Religionis non abjicito: si abjicit, segregatur à Communione, si perseverat, deponitur. Canons against the Marriage of Priests.

But however it cannot be denied, but there were ancient Canons against the Marriage of Priests; but those only forbid Priests to marry, but did not restrain married Men from being Priests: And so it continued for many hundred years after Christ's time, and for some time they might have married * with the Licence of the Bishop; but never received or put in practice * Concil. An-
in England, though practised in Italy, cyran Can. 10.
France, &c. But the Priests here married, till *Anselme*, Archbishop of Canterbury, a Burgundian, a powerful and busy Prelate, in a Synod

Hollinghead
30.b.1c.

Ibid. 34.b.10.

Synod or National Council held at *Westminster*, made a severe Canon against it; but he meeting with an obstinate Clergy, that were unwilling to change their Wives for Concubines (to speak in the softest word) were not obedient: Whereupon (as my Author tells me) he called a second Council in the Ninth year of that King, where he made more severe Canons against the married Clergy in the presence of the King and Nobility, to give them greater Authority; which he prosecuted with great Zeal, but did not live to effect what he desired.

I do not find that his Successor, *Rodolphus*, troubled himself much in this concern of the Eight years that he governed the Church of *Canterbury*; but his Successor, *William Corbet*, followed the steps of *Anselme*, who for this, and his other good Works, was Canonized a Saint at *Rome*: And in the Year 1126. called a Council or Convocation at *Westminster* against the Married Priests, wherein one *John de Crema*, or *Cremenfis*, the Pope's Legate, sent to manage this business, being a Learned Man, made an eloquent Oration in commendation of Chastity and a single Life, and inveighed violently against the Married Clergy; and as divers Authors of good Credit affirm, the Great Orator was the same Night taken in Bed with a Woman, which made him to return with shame enough: Howsoever, as Bishop *Godwyn* tells us, That in that Convocation the Canons were renewed against the Married Clergy; but the Archbishop finding

Hoveden in
H. I. 274.
Speed 461.a.
&c.

finding himself too weak to deal with so stubborn a Clergy, commended the care of this business to the King, who taking advantage of the Canons, squeezed some Money out of the Married Clergy by way of Commutation.

Bp. Godwin's Catal. of Bish. 83. Mat. Parif. LXX. agrees with Hoveden, and says, Quod ipse cum die illa Corpus

Christi consecrasset post vesperam fuit in meretricio interceptus: Res ipsa notissima negari non potest, dum magnum decus in summum dedecus commutavit.

I find no more of this matter, till after the death both of this Archbishop and Henry the First: But I find there was a Convocation held at London, Decemb. 13. 1138. by the command of Albert Cardinal, Bishop of *Hofia*, where this matter was again violently prosecuted; and I find no more after of it, till in a Convocation or Council held under Richard Wethershead Archbishop of Canterbury, 1229. in which it is decreed, *Qui autem in Subdiaconatu vel supra ad matrimonium con-* *Goodwin 84. Fuller's Eccl. Hist. 27.*
volaverint, mulieres renitentes & invitas relinquant.

But it should seem, notwithstanding all this Persecution, that for some years after some married Men held their Livings: For in a Synod or Council held by Orto the Pope's Legate at St. Paul's in London, in the Year 1237. there is a Canon to this effect: *Inno-* *Cap. De uxora-*
tuit nobis, pluribus referentibus fide dignis, quod *tis à beneficiis*
multi propria salutis immemores, Matrimo- *amovendis.*
niis contractis, clandestine retinere cum ux-
oribus Ecclesias, & Ecclesiastica Beneficia adi-
pisci de novo, & promoveri ad sacros Ordines
contra statuta sacrorum Canonum, non formi-
dant, &c.

And

And then proceeds: *Quod si repertum fuerit aliquos taliter contraxisse, ab Ecclesiis & Ecclesiasticis Beneficiis (quibus tam eos quam quoslibet alios uxoratos fore decernimus ipso jure privatos) removeantur omnino, &c.*

This Nail being thus at length driven to the Head, the Secular Clergy lay about Three hundred years under this Bondage, and though, if they would be at the cost, they might have Dispensations to keep Concubines; yet, for the Credit of his Holiness, there was a great care taken they should not do it publicly, or scandalously. To which purpose there is a Canon in the same Council I last mentioned, to this effect:

Cap de Concubinis Clericorum removens.

* Nota.

Canons against Concubins.

Statuimus & statuendo precipimus, & ubi Clerici, & maxime in sacris Ordinibus constituti, qui in domibus suis & alienis detinent publice Concubinas, eas à se prorsus removeant infra mensem, & illas vel alias de cætero nullatenus detenturi, &c.

There was another Canon much like this, made in another Council held under Stephen Langton, Archbishop of Canterbury, at Oxford, not long before, in the Year 1222.

cap. Clericalis

* Nota.

to this effect: *Quod Clerici Beneficiati aut in sacris Ordinibus constituti in Hospitiis suis publice tenere Concubinas non audeant, nec etiam alibi cum scandalo accessum publicum non habeant ad eas.*

So that it appears clearly by these Canons, that Clerks were not in those days positively and absolutely forbidden to keep Concubins; but it must not be done, *publice nec cum scandalo*, nor must they have *publicum accessum*.

And

And it appears by the *centum gravamina* Dispensations that were presented to the Pope about the Year 1521. by the *German Princes*, that it was one of the Grievances of that Nation, That the Pope permitted Clerks, Religious and Secular persons to live publicly with their Harlots, and get Children ; and that in most places the Bishops and their Officials not only tolerated Concubinage upon paying Money in the more dissolute sort of Monks ; but also exacted it of the most Continent, saying , *It was then at their Choice, whether they would have them or no.*

Dispensations for Concubinage, Hist. H. by my Lord Chierbury, p. 131. Art. 74. Art 91.

So upon the whole matter, it seems, it was no Offence in a Clergy-man, that had a Dispensation to keep a Concubin privately in a nook without Scandal, and go to her in the dark ; but to keep a Wife of his own was a Sin against the Holy Ghost, he must be deprived, he must be deposed.

Calvin's Inst. b. 4 c. 12. § 23.

And therefore he cannot blame the *German* and *French* Laity, that they were so solicitous in the Council of *Trent* to have their Priests married, being loath (as should seem) to trust their Wives and Daughters at Confession with Priests that had not Wives of their own.

Dyer 133 p. 1. 2 H 4. 26. a. c. Cap. De uxoris à beneficiis amovendis, ubi supra.

And it was no less a religious than prudent Expression of Pope *Pius* the Second, *That though there were many weighty Reasons why Priests should be restrained from Marriage, yet the Reasons for restoring them their Wives were the more weighty.*

I would not have the Reader to think, that I speak this to reproach the Church of *Rome* with this matter, as any of the allowed Doctrines of that Church; for I know there are many very severe Canons against the Incontinence of Priests; and not so only, but that forbids them to keep any Women in their Houses, but Mothers, Sisters, and other near Relations, to avoid Scandal and Temptations. But I write this, to shew the Corruption of the Court of *Rome*; for whilst the Pope has power to dispence with the Canons of the Church, Money will make the best ineffectual there.

1 H. 7. cap. 4.
*Statute, That
 the Bishops
 should imprison
 Priests for In-
 continence.*

Having given the Reader this Historical account concerning the restraint of the Marriage of Priests, and the success of it, I will in the next place shew what Acts of Parliament have been made relating to this matter, and which are in force at this day.

Vid. Bro. Abr.
 Tit. Cult. 10.
 Lond. Tr. 74.
*as to the Cu-
 stom of London.*

In the first year of *H. 7.* there was an Act made, ' That it should be lawful to all Arch-
 ' bishops and Bishops, and other Ordinaries,
 ' having Episcopal Jurisdiction, to punish
 ' and chastize such Priests and Clerks, and
 ' Religious Men, being within the bounds of
 ' their Jurisdiction, that should be convicted
 ' before them, by Examination and other
 ' lawful Proofs requisite by the Law of the
 ' Church, of *Avowtry, Fornication and Incest,*
 ' or any other Fleshly Incontinency, by com-
 ' mitting them to Ward and Prison, there
 ' to abide for such time as shall be thought
 ' to their discretions convenient for the qua-
 ' lity

lity and quantity of their Trespafs. And *It seems a Canon would not justify an Imprisonment.*
 that none of the said Archbishops, &c. be
 thereof chargeable, of, to or upon any
 Action, or false or wrongful Imprison-
 ments, but that they be utterly thereof dis-
 charged in any of the Cases aforesaid, by
 virtue of this Act.

This Law, for ought I know, stands still *31 H. 8. c. 14.*
 in force: But there was a severe Law made *Made Felony to use their own Wives.*
 in the 31th of H. 8. whereby it was made
 Felony for a Priest carnally to use a Wo-
 man, to whom he had been married or
 contracted; or if he kept company or fa-
 miliarity with her, or if any Priest kept a
 Concubin, as by paying for her Board,
 maintaining her with Money, or other gifts
 or means, to the evil Example of others, he
 should forfeit all his Goods, Chattels and
 Spiritual promotions, and be put in Prison
 for the first Offence, and the second Offence
 to be Felony.

But this seeming too severe, was the next *32 H. 8. c. 14.*
 year Repealed; and it was enacted, 'That *mitigated.*
 such Offender should for the first Offence
 lose all his Goods, Chattels and Debts, and
 lose the profits of all his Ecclesiastical pro-
 motions, but only for his life: For the se-
 cond Offence to forfeit his Goods, Chattels
 and Debts, and the profits of all his Lands,
 and of his Spiritual Benefices, Promotions
 and Dignities, for his Life: And for the
 third Offence should make the like forfei-
 ture, and be Imprisoned during life.

By

31 H.8. c.14.
The six Articles
make the mar-
riage of Priests
Herefy.

By an Act of Parliament made in the 13th of H.8. which is commonly called the Act of the six bloody Articles, by the third Article it was decreed, *That Priests, after they have received Orders, might not marry, and to affirm the contrary thereof, was made Herefy and Treason by that Act.* But this bloody Act was repealed by 1 E.6. cap.12.

All Laws a-
gainst mar-
riage of Priests
made null and
void.
Children legi-
timate.

By the Statute of 2 & 3 Ed.6. cap. 21. *All Laws, Statutes, Canons, Ordinances, and Consti- tutions made against the Marriage of Priests, are made null and void.*

And by another Statute made 5 & 6 E.6. cap.12. it is adjudged and declared, *That the marriage of Priests is lawful, and legitimates their Children, and makes them capable to endow their Wives, and to be Tenants by the Curtesy.* But these Laws were repealed by the Statute of 1 Mar. cap. 1.

1 Jac. cap.25.

However it came to pass I know not, but for ought I can find these Acts lay repealed all Queen Elizabeth's time, till 1 Jac. then the latter Act was revived and made perpetual, and their Children made legitimate.

See 2 Inst.686.

See 2 Inst.683.

So that upon the whole matter, all Acts of Parliament, Canons, Constitutions, &c. that restrain the marriage of Priests, or that illegitimate their Children, are made null and void; but the Canons and Acts of Parliament that punish their Incontinency stand in force.

Next let us see what Privilege the Clergy have right to at this day.

C H A P. XI.

What Privileges belong to the Clergy at this day, by the Common and Statute Laws of this Realm, and likewise by the Laws Ecclesiastical.

THE Laws of this Realm have allowed *The Privilege of the Clergy.*
the Clergy in Holy Orders many
great Privileges: *2 Inst. 3. 625.*

First, In their Persons, they are not com- *4. 1 Lev. 303.*
pellable to serve in any Temporal Office, as *May not be Offi- cers temporal.*
Sheriff, Constable, Overseer of the Poor, &c. *5 E. 3. c. 5.*
'Neither can they be prest to serve in the *1 R. 2. c. 15.*
'Wars; neither may they be arrested in the *Co. 2. Inst. 3.*
'Church or Church-yard, when they are *Must not be ar- rested in Church or Church-yard.*
'attendant on Divine Service, upon pain of *Grot. de Jure Belli l. 1. c. 2.*
'Imprisonment, and ransom at the King's *§ 10. 9.*
'pleasure, and likewise to make Agreement *Co. 2 Inst. 58.*
'with the party.

And by a Statute made 1 *Mariae*, it is enacted,

'That if any Person, &c. of their own *1 M. Sess 2 c. 3.*
'Power and Authority at any time, &c. *Must not be di- sturbed praying or preaching.*
'shall or do willingly or of purpose, by
'open and overt word, fact, act or deed,
'maliciously or contemptuously molest, let,
'disturb, vex or trouble; or by any other
'unlawful way or means, disquiet or misuse
L any

' any Preacher or Preachers, &c. licensed,
 ' allowed or authorized to preach by the
 ' Queen, or by any Archbishop or Bishop
 ' of this Realm, or by any other lawful
 ' Ordinary, or by either of the two Uni-
 ' versities, &c. or otherwise lawfully autho-
 ' rized or charged by reason of his or their
 ' Cure, Benefice, or other Spiritual Promo-
 ' tion or Charge, in any of his or their Ser-
 ' mon or Collation in any Church, Chappel,
 ' or Church-yard, or in other place appoin-
 ' ted to be preached in.

' Or if any Person, &c. shall maliciously,
 ' willingly or of purpose, molest, let, disturb,
 ' vex, disquiet, or otherwise trouble, any
 ' Parson, Vicar, Parish-Priest or Curate, &c.
 ' saying, doing, singing, ministering or cele-
 ' brating Mass, or other Divine Service, Sa-
 ' craments, &c. that at any time then after
 ' shall be allowed, set forth or authorized by
 ' the Queens Majesty.

' That the Offender upon Conviction be-
 ' fore two Justices of the Peace, shall by
 ' them be committed to the Gaol without
 ' bail or mainprize for three Months, and
 ' after to the next Quarter-Sessions; where,
 ' if he repent and be reconciled, then to be
 ' discharged of his Imprisonment, finding
 ' Sureties for his good Behaviour; and if he
 ' fail therein, to be continued till the next
 ' Quarter-Sessions.

This Act, though made in the time of
 Popery, is still in force, and may be exe-
 cuted upon such as disturb the present Mi-
 nisters, Parsons, Vicars and Curates, &c.

And

And though it refer to such Church-Service as then after should be sealed by the Queen, yet I conceive it extends to her Successors; and a Settlement by Act of Parliament, is a Settlement by the King in the most superlative manner.

And the late Act for Uniformity declares and enacts, *That all former Acts for Uniformity of Common-Prayer shall be of force, and extend to the Book of Common-Prayer.* ^{14 Car. 2 c. 4.}

The Bodies of Clergy-men cannot be arrested upon any *Capias* sued forth upon any Statute-Staple or Statute-Merchant; for the Processess are made out conditionally, *Si Laicus fuerit*: And if the Sheriff, or any other Officer, arrest a Clergy-man upon any such Conditional Process, I conceive an Action of False Imprisonment lies against him that does it, or he may have a special ^{2 Inst. 4.} *Supersedeas* out of the Chancery, (that is, the ^{Regist. 147.} *Curfitor's Office*.)

And every Parson, Vicar, &c. is by the Common Laws of England free from the payment of Tolls in all Fairs and Markets, not only for all the Goods and Merchandizes gotten upon their Church-Livings; but also for all Goods and Merchandizes by them bought to be spent upon their Rectories and Church-Livings. ^{Privilege in their Goods. Co. 2 Inst. 3. Regist. 260. a. Free from Tolls. Vid. Diversity. Davis of Impositions, 13. Pontage, Murage, Co. 2 Inst. 4.}

And they are quit of Pontage, Murage, and other like Charges; and if they be distrained for any of these, they may have a Writ out of the Chancery, as aforesaid, made of course without Petition or Motion, under ^{See the Ancient Law. Selden in Drayton's Polyolbion, 188. Vide Ezra c 7. v. 24. ad idem.}

the Great Seal of England, directed to the party that distrains or disturbs them for any of these things, commanding them to desist: And if such Writ be not obeyed, the Curfitor of course will make out an *Alias* and *Pluries*; and if none of those will be obeyed, an Attachment to arrest the party, and detain him till he obey: And this Writ is called, a Writ *De essendi quietum de Toloneo*, which you may see in the Register, or in the *Natura Brevium*.

Regist. 260.a.
F.N.B. 227.f.

But Clergy-men are liable to all publick Charges imposed by Act of Parliament, and in particular for reparation of High-ways. *1 Ventris 273.*

Not bound to
appear at Leets
and Sheriffs
Turn.

Regist. Orig.
175.a.
F.N.B. 160.c.

They are not bound to appear or do Suit at the Sheriffs Turn, or any Leet or Law-day; and if they shall be distrained so to do, they may have a Writ of course in the *Chancery* directed to the Lord of the Leet, commanding him to forbear distraining them for any such cause, with like Process as in the last for his Contempt.

Stat. 13 E.1.
2 Inst. 491,
492, 493.

And by the Statute of *Circumspecte Agatis*, it is enacted, *De violenta etiam manuum injectione in Clericum, & in causa defamationis placitum tenebitur in Curia Christianitatis, dummodo ad correctionem peccati agatur; & non petatur pecunia.*

Co. Inst. 96.a.
Regist. Orig.
187.b.
F.W.B. 175.b.
Not to be Bailiffs, Reeves,
&c.

And if a Clergy-man have Lands by the Tenure of which he is subject to be Bailiff, Reeve or Beadle, and be chosen into any such Office by reason thereof, he has a Cursory Writ out of the *Chancery* to discharge himself.

A Writ of Privilege was granted to excuse the Archdeacon of *Rocheſter* from being an Expen-

Expenditor in the *Level* in *Romney-Marsh* in
Kent. 1 *Mod. Rep.* 282. 1 *Vent.* 105. 1 *Lev.* 303.

So if the Sheriff or Collector of the Tenth or Fifteens will disturb them in the Lands belonging to their Churches, &c. they may have the like Writ for their discharge, and like Process for disobeying it, *ut supra.*

Regist. Orig.
 183. a.
 F.N.B. 176. a.
 Must not be disturbed by Collector of Tenths.

But it hath been held, That Tythes may be extended upon an *Elegit* for the Debt of the Parson, *quod mirum* : But the *Elegit* being given by a Statute in which Tythes are not excepted, it will draw in Tythes.

Harwood vers.
 Palyn. 24 Car.
 1. B.R. per B.

Anciently if a Clergy-man had been convicted of any Murder, Robbery, Burglary, &c. he was upon the demand of his Ordinary to be delivered over to him, where he was to make his Purgation according to the Rules of the Ecclesiastical Laws ; and if he cleared himself, he was acquit * without any regard to his conviction at Common Law ; but if they adjudged him guilty, then he was to be degraded and kept in Prison : And this was confirmed to them by several Acts of Parliament.

2 Inst. 633.
 634. 635.
 The Privilege of Clergy in criminal Cases.
 * Lindwood, cap. Clerici pro suis criminibus detent. gloss. verb. pro convictis.
 West. 1. cap. 2.

But this Privilege was never allowed to them in this Kingdom in Treason, Petit Treason or Sacrilege.

Marlbr c. 27.
 25 E. 3. cap. 4.
 & 5.

And a Delinquent might have had his Clergy *ad infinitum*, till the Statute of 4 H. 7.

4 H. 4. c. 3.
 4 H. 7. c. 13.

And though this Privilege of the Clergy be taken totally away in many cases by several Statutes, and in other cases Lay-men have it in common with the Clergy, if they can read as a Clergy-man ; and though

the delivery of them over to the Ordinary be totally abolished; yet the Clergy that are in Holy Orders at this day, retain some of their ancient Privileges, which the Lay-men are not capable of.

Co. 5. 50.
Bro. Cor. 2 11.
2 Inst. 637.
Hob. 294.

For if a Clerk in Holy Orders be convicted, (that is, found guilty by the Petit Jury) of a Crime for which the benefit of the Clergy is allowable, at this day he shall not upon the allowance thereof be burned in the Hand (as a Lay-man shall) upon the producing of his Orders; and if he have not them with him, the Court may, *ex gratia*, give him time to produce them till any other Assize or Sessions.

Co. 2 Inst. 637.
St. 4 H. 7. 13.
28 H. 8. cap. 1.
1 E. 6. cap. 12.

And a Clerk in Holy Orders, at this day, shall have his Clergy *ad infinitum*, from time to time, which no Lay-man can have above once.

See Co. 2 Inst. 3.
St. 3 E. 1. c. 1.
14 E. 3. c. 1.
18 E. 3. c. 4.
1 R. 2. c. 3.
Purveyance.

The Goods of Clergy-men were by several Statutes exempted and free'd from the King's Purveyance; but his Majesty having by Act of Parliament graciously released this duty, the Laity hath the same Privilege.

2 Inst. 267.
Not amerced
for the Church-
Land.

A Clergy-man shall not be amerced the higher in respect of his Church-Living or Benefice. *Mag. Cart. c. 14. Co. 2 Inst. 29.*

Regist. Orig.
289.
F. N. B. 29.
No Execution
upon the Goods
of the Churches.

Nor shall any Execution be executed upon the Goods of his Church, nor any Distress taken in the ancient Fee thereof; but otherwise it is of Lands of late purchase: And if he fear any such thing, he may have a Protection in Chancery *cum clausula*, (*Quia volumus.*)

If an Action of Trespass, Debt, Account ^{2 Inst. 4.}
 or other Action, wherein Process of *Capias* ^{No Capias against a Clerk.}
 lies, be brought against a Clerk in Holy ^{9 E. 3. 30.}
 Orders, and the Sheriff upon the Original ^{24 E. 3. 44.}
 Return, that the Defendant is, *Clericus Beneficiatus nullum habens Laicum feodum ubi summoneri potest*; in this case the Plaintiff cannot have a *Capias* to arrest his Body, but a Writ to the Bishop to compel him to appear.

And by a Statute made in the Fiftieth year ^{50 E. 3. c. 5.}
 of Edward the Third it is recited, 'That
 'as well divers Priests bearing the sweet
 'Body of our Lord Jesus Christ to Sick
 'People, and their Clerks with them, as
 'otherwise divers other persons of Holy
 'Church, whilst they attend to Divine Services
 'in Churches, Church-yards, and other
 'places dedicated to God, be sundry times
 'taken and arrested by Authority Royal,
 'and Commandment of other Temporal
 'Lords, in offence of God and Holy Church,
 'and also in disturbance of such Divine Services:
 'The King wills, and grants, and
 'defends upon grievous forfeiture, that none
 'do the same from henceforth; so as Collusion
 'or feigned Cause be not found in any
 'of the said persons of Holy Church in
 'this behalf.

In the first year of R. 2. there was another ^{1 R. 2. cap. 15.}
 Statute made to the like effect, with this
 added, *That the party convicted should be imprisoned,
 ransomed, and made agree with the party so arrested.*

L 4.

So

Co. 12. Rep. 99.

So that if any Parson, Vicar or Priest be arrested in going, staying or returning to do Divine Service, according to his duty, he may have an Action upon this Statute, and recover Damages, and have the party Fined and Imprisoned that made the Arrest, and the Clerk that is assistant may have the benefit of these Laws.

Privilege of the Clergy confirmed by several Parliaments.

And note, That all the Privileges of the Church of *England* are confirmed by the Statute of *Magna Charta*: And so they were for the most part at the opening of every other Parliament after, till the beginning of the Reign of *Henry the Fifth*. How it came then to be discontinued by the negligence of the Clergy, or for what other cause, I know not.

And so having thus briefly mentioned many of the Privileges of the Clergy, whereof the Common Law takes notice, and to which they have right at this day, by the Laws and Statutes of this Realm; next I will shew the Reader what Privileges they pretend unto, at, and by the Canon and Civil Law, which Mr. *Lindwood* reckons up in Fourteen particulars:

Cap. Item statumimus verb. Clericali Privilegio. Concil. Agatha. c. 23.

Primo, In hoc quod non conveniantur coram Judice seculari. Vide Concil. Agathi Canon 23.

But

But this Privilege has not been allowed to them here in *England*; and this was Resolved in the 7th year of *Henry the Eighth*, in the Case of one Dr. *Horsey*, Chancellor of the Bishop of *London*, Of which Case, for the rarity, I will give the Reader a brief account, and it was thus:

‘ One *John Hunn*, a Merchant of *London*, had prosecuted *Horsey* in a *Premunire*; whereupon *Horsey* caused *Hunn* to be arrested for suspicion of Heresy, and committed him to *Lollards-Tower*, being the Bishop of *London*’s Prison, and in a Morning, soon after, the Prisoner *Hunn* was found dead and hanged in Prison: And it was given forth, That he had hanged himself in his Girdle; but notwithstanding it was believed, that *Horsey* and the Gaoler had murdered him.

‘ This coming to the Gaoler’s Ear, he took Sanctuary at *Westminster*; upon which, and other great Circumstances, *Horsey* and the Gaoler’s were by a Coroner’s Inquest in *London*, upon view of the Body, found guilty of the Murder; and *Horsey*, as should seem, being in Orders, (I dare not say, Holy) stood upon this Privilege, Not to be Tried before Temporal Judges.

‘ And this being a Dispute between the King’s Prerogative and the Privilege of the Church; the King, at request of the Temporal Lords and many of the Commons in Parliament, called before him at the *Blackfryars*, divers of his Spiritual Council, Divines

Vid. Stillingfl.
of the Eccl.
Commission, 24.
Irenicum 43.
Kelway 182.
&c.

4 H. 8. c. 2.

' Divines and Canonists ; where the Clergy
 ' had one of their Counsel argued for their
 ' Privilege , and Dr. *Standish* , a Learned
 ' Divine, argued for the King : But the great
 ' Offence taken was against the Abbot of
 ' *Winchcomb*, who in his Sermon preached
 ' at *Paul's Cross*, in the time of the Parlia-
 ' ment, had affirmed, That the Act made
 ' 4 H. 8. (which took away Clergy from
 ' Laicks in many Capital Offences, but not
 ' from Clerks in Holy Orders) was against
 ' the Law of God, and Privilege of the
 ' Clergy, and that the Makers of the said
 ' Act had incurred the Censures of the
 ' Church.

' Soon after Dr. *Standish*, who had Argued
 ' for the King, was cited before the Con-
 ' vocation, and there charged with matters
 ' of Heresy, arising from matters which
 ' had passed in his Argument ; whereupon
 ' he made his application to the King, who
 ' being satisfied of the justness of his Cause
 ' by Dr. *Veisey*, Dean of his Chappel, assem-
 ' bled all his Judges and Counsel Spiritual
 ' and Temporal, and divers of the Parlia-
 ' ment-men : And after hearing of Di-
 ' vines, &c. the Judges declared, That those
 ' of the *Convocation-House* that were at the
 ' awarding of the Citation against Dr. *Stan-*
 ' *dish*, were in a *Præmunire*.

' And *Fineaux*, Chief Justice, did declare,
 ' in the Name of all the Judges, That the
 ' Convention of Clerks before Temporal
 ' Judges had been maintained by many
 ' good

‘ good and religious Kings of this Realm, and
 ‘ many good and holy Fathers of the Church
 ‘ had been obedient to it, and content with
 ‘ the Law of the Land in this Point, &c.

‘ And Dr. *Veisey* gave the Reason, *Because* Selden de Dec.
 ‘ the Canon in that Point was never received or in Pref. 5. Re-
 ‘ allowed in England. view 478.

‘ But the Clergy not being satisfied, the
 ‘ two Archbishops (two affirmed, that they
 ‘ were bound * by Oath to maintain the * Nota.
 ‘ Privileges of the Church) moved the
 ‘ King, that to avoid the † Censures of the † Nota.
 ‘ Church, he would refer the matter to the
 ‘ Pope.

‘ But *Henry* the Eighth stoutly answered,
 ‘ That He, by the Decree and Sufferance Selden's Titles
 ‘ of God, was King of *England*, and the of Honour, 19.
 ‘ Kings of *England* in time past had no Su-
 ‘ perior but God only; and therefore know,
 ‘ that he would maintain the Right of his
 ‘ Crown and his Temporal Jurisdiction, as
 ‘ well in this Point as in all other.

‘ And after *Horsey* (that all this while had
 ‘ been protected in the Archbishop's House
 ‘ at *Lambeth*, the Bishops having made his
 ‘ Peace with the King) appeared privately
 ‘ in the *King's-Bench*, and pleaded *Not guilty*
 ‘ to the Inquisition; and *Erneley* the King's
 ‘ Attorney confessed the Plea, whereby
 ‘ *Horsey* was discharged (the more pity,)
 ‘ and the Bishops promised to dismiss *Stan-*
 ‘ *dish*: And so this Point was settled against
 ‘ the Church, as 'twas very good reason.

I shall make no Comment upon the Case, though there are many things in it worth observation ; and those that are not satisfied with this short account of this Case, may read it at large in *Kelway's Reports*, with all the Circumstances, and the Reader will not think his time ill spent, but with me praise God, that the King and Nation are free'd of the Popish Bondage and Clergy.

2. The second Privilege mentioned by *Lindwood*, is, *Quod verberans Clericum incidit in Canonem*.

This Privilege is confirmed to the Clergy by the Statute of *Circumspecte Agatis*, that the Spiritual Court should have Jurisdiction, *Co. 2 Inst. 492. de violenta manuum injectione in Clericum*; but the end of such Suit in the Spiritual Court is only, *pro salute animæ*, by Excommunication or Penance.

And if a Clerk should sue in the Spiritual Court in point of damage, he runs himself in danger of a *Pramunire* ; for the Ecclesiastical Judge may proceed only *ex officio* to correct the sin.

But if the Clerk will in this recover damages, he must bring his Action at Common Law.

And note, That such Suit in the Spiritual Court can only be sued by one in Holy Orders.

3. The

3. The third Privilege, *Lindwood* mentions, is, *Quod non vocantur ad onera secularia.*

This Privilege the Common Law allows; but it must be intended of such Charges as were at Common Law, but not of new Charges by Statute Law; in which the Clergy are not exempted, as hath been said before in the beginning of this Chapter.

And yet note, That the Clergy, till the late Rebellion, granted all their Subsidies in their Convocations; but in the late Acts of Parliament are taxed promiscuously.

4. The fourth Privilege *Lindwood* mentions, is, *Quod possunt facere Collegium ubi hoc Laicis non licet.*

It is true, that before the Reformation the Clergy have erected Colleges, Abbies, Priors, and other Spiritual and Religious Corporations by the License of the Pope, or the Bishop; but generally confirmed by the Kings.

Vid. Dyer 267.
a. b. & 81. a.
9 H. 6. 16. b.
Co. 4. 107. b.

But without License of the Bishop of the Diocese, it was forbid to erect any such by several Canons; and by such License, I take it, a Lay-person as well as a Clergyman, might have erected a College, &c. But here in *England*, the Clergy never had greater Privilege than the Laity in this matter; for no such Corporation could ever be erected here but by the Royal Authority.

Conc. Agatha.
Can. 18.
Conc. Aurelian.
Can. 12. q. 2.
Grat.
9 H. 6. 16. b.
Dyer 81. p. 64.
& 267. p. 12.
Co. 4. 107. b.

5. The

5. The fifth Privilege reckoned by Lindwood, is, *Quod possunt vindicare rem concessam Ecclesiae ante deliberationem.*

2 Inst. 492.:

This Privilege is of no use here in England, because the Spiritual Courts have not power to determine the right or property of Lands or Goods.

6. The sixth Privilege, is, *Quod eodem Privilegio gaudent persona & familia.*

This Privilege holds no further here in England, than in such particulars as are mentioned in the former part of this Chapter.

7. The seventh Privilege by Lindwood mentioned, is, *Quod facientes Statuta contra Clericos sunt ipso facto Excommunicati.*

He that would attempt to put this Privilege in execution, would endanger to run himself in a great *Præmunire*; and many Statutes have been made against the Clergy in the height of Popery, as the Reader may find in many parts of this Book.

8. The eighth Privilege, is, *Quod soli Clerici possunt beneficium Ecclesiasticum obtinere.*

This is allowed without Dispute.

9. The ninth, is, *Quod per literas impetratas contra Laicum, cum clausula generali non potest Clericum conveniri.*

I must leave this to the Civilians to determine; for I must ingenuously acknowledge, I do not understand the meaning of this, nor the next; which is,

10. *Quod in Civili nomina sportularum non tenentur dare nisi quatuor siliquas.*

Hæc tamen de jure Canonum non debentur, says the Author; and then proceeds,

I I. *Quod*

11. *Quod de Acquisitis licet sint in potestate Patris possunt testari.*

This, and the next Privileges, are in the Spiritual Law and Courts, and not opposed by the Common Law.

12. *Quod sine consensu Patris agere possunt pro rebus suis recuperandis.*

13. The thirteenth I must leave it as I find it; and it is, *Quod non pignorari.*

14. The last is, *Quod si sciente Domino servus efficiatur Clericus liberatur à Domini potestate.*

I do not find any such Privilege allowed in *England*, but it may be reasonable enough; these Four last are only known to the Civilians, to whom I leave them.

And so much for the Privilege of the Clergy by the Canon and Civil Laws: But I conceive they receive more benefit by those the Common Law allows to them.

CHAP

C H A P. XII.

How the Law stands concerning Churches, Chappels, and Church-yards, in whom the Freehold is, and how to be Repaired, and concerning Seats, Burials, Tombs, Coats of Arms, and other Ensigs of Honour in memory of the Dead, and of Church Ornaments, and at whose Charge to be provided, and what remedy against those that shall commit any Trespas in the Church, Church-yard, or in breaking up Tombs, taking, carrying away, or imbezelling any of the Goods or Ornaments of the Church, &c.

Church unde dicitur.

The several acceptations.

THE word CHURCH is taken from the Saxon word Cīpc, or Cīpic, which Name is still retained in the North parts of *England*, and in *Scotland*, by changing the C into K, as was usual with the English Saxons; in Latin *Ecclesia*, or *Basilica* from the Greeks; and it hath in the Holy Scriptures several acceptations; for sometimes it is taken for one Family of the Faithful People of God, as 1 Cor. 16. 19. Rom. 16. 4, 5. Sometimes for the Christian People

People of one Country or Province, *Rom. 6.*

23. Sometimes a Council or Synod is taken for the Church, *Mat. 18. 17.* and sometimes,

pro universa fidelium per totum terrarum orbem

diffusorum multitudine: And sometimes for the Material Church, as *1 Cor. 11. 18.* and *14. 34.* Church, quid.

And that is the Church of which I am now to Discourse, That is, a Building made of Stone, Brick, Timber, and other Materials, for the meeting of Christians to hear the Word of God read and preached, and to join in Prayer and other Religious Duties; built by the License of that Bishop in whose Diocese the same is erected, and by him consecrated to that Service, an Office peculiarly belonging to the Office and Dignity of the Bishop.

Distinctio 1.

Nemo Ecclesiam.

See the several Acceptations of the word Church, in King's Enquiry of the Constitution, &c. of the Primitive Church, *L. 1. c. 1.* §. 1, 2, 3, &c.

The Ancient manner of Founding Churches, was, After the Founders had made their applications to the Bishop of the Diocels, and had his License; the Bishop, or his Commissioners, set up a Cross, and set forth the * Church-yard where the Church was to be built, and then the Founders might proceed in the Building of the Church; and when the Church was finished, the Bishop was to consecrate it; but not till it was endowed, and before the Sacraments were not to be administered in it. See *Stillingfl. Eccl. Cases*, 238.

The manner of founding of Churches.

Ridley's View, 76.

Causa 16. q. 1. quicunque q. 3.

Lat. Concil.

Chalcedon 1.

Can. 4.

* *Ut Major Ecclesie per circuitum 40 passus habeat. Capella vero vel minoris Ecclesie.*

See Sir Tho. Ridley's View of the Civil and Ecclesiastical Laws, 191. more of this matter.

M

But

3 Inst. 201.
Who may build
a Church.

But by the Common Law and Custom of England, any good Christian may build a Church without the License of the Bishop, which was confirmed by the Pope at the request of King *John*, with this qualification, so that it were with the Bishops consent, and not prejudicial to any ancient Churches: But however the Law takes no notice of them as Churches, nor have they any privilege, till they be consecrated by the Bishop.

3 Inst. 203.2.

Where a Church
shall be re-con-
secrated.

Conc. Nicæ
pars 3. dist. 1.
Ecclesiis semel.
Ibid. Si mortum.

And in some cases, though a Church have been consecrated, it must be re-consecrated; as in case any Homicide, Adultery, or Fornication shall be committed in it, or the Church burned: But the re-building of the Walls, if the Altar (that is, the Communion Table) were not removed, requires no new Consecration, nor Churches consecrated by Hereticks, *In fide Sanctæ Trinitatis in forma Ecclesiæ*, are not again to be consecrated.

Ibid.

Division.

The Church consists of Three principal Parts, that is, the Belfrey or Steeple, the Body of the Church with the Isles, and publick Chappels, and the Chancel.

In whom the
Freehold is.

11 H. 4. 12. 2.

21 H. 7. 21. b.

Cio. Jac. 667.

8 H. 6. 9.

8 H. 7. 12.

38 H. 6. 19.

15 H. 7. 8. 36 H. 6. 19. 15 H. 7. 8. Noy 104.

The Freehold of the whole Church, and Church-yard, are in the Parson or Rector, and therefore the Parson may have an Action of Trespas against any Body that shall do any trespassable act in the Church, or Church-yard; as in breaking

Seats

Seats annexed to the Church, in breaking the Windows, cutting the Trees, or taking away the Leads, or any of the Materials of the Church, or for breaking Windows, the party may be indicted and fined, and bound to his good Behaviour.

The Body of the Church, the Belfrey, and all publick and common Chappels, within or adjoyning to the Church, are by the Laws and Custom of *England*, to be re-edified, maintained and repaired, at the charge of the Parishioners and Land-holders within the Parish; and herein the Common Law and Custom of *England* is kinder to the Clergy, than in other Countries where the whole charge lies upon the Rector.

Who is to repair Churches.
2 Inst. 653.
Coke 5.67.b.
Strath. tit. Acc-
compt.

Anciently the Bishops had a Third part of the Tythes and Offerings, in some places a Moiety, and in some places a Fourth part, and in consideration thereof were bound to the Repair of the whole Church; but upon a Release of this Interest to the Rectors, they were acquitted of the Repairs of the Churches, and had only two shillings for the Honour of the Bishops Chair, in lieu thereof, called *Cathedraicum*, which duty (as I take it) was never paid in *England*; and the Reason might be, because the Bishops here were never charged with the repair of the Churches, and had therefore no share in the Offerings; *tamen inde quære.*

How Churches were anciently repaired.

C. 10. q. 5.
Quia vero &c
placuit ut natus
lus Conc. Bra-
ga. cap. 2.
Cathedraicum,
how it came due.

*Who is to raise
Money for the
repair of the
Church.*

The Churchwardens are to raise the Money for the repair of the Church, and are to make the Repairs; and for the raising Monies to that purpose, they are to make their Levies in this manner :

*The manner to
make a Levy
for the Church.*

Co. 5. 67. b.:

The Sunday before the Churchwardens design to make a Levy, they are to give publick Notice in the Parish-Church, immediately after Common-Prayer, of the time and place designed for making the intended Levy; and then at the place and time appointed, the Churchwardens and the Parishioners, there met, are to consider what Sum of Money will be necessary to be raised for such Repairs as shall be then needful; and after they, or the major part of the Parishioners, there met, have agreed what Sum is fit to be raised, then they, or the major part there present, are to proceed, and make an equal Levy upon all the Parishioners and Land-holders within the Parish; and if any of the Parishioners refuse to pay their Rates, being demanded by the Churchwardens, they are to be sued for, and to be recovered in the Ecclesiastical Court, and not elsewhere.

*How it is to be
recovered.*

Stat. Circum.
specie Agatis,
13 E. 1.

Reg. Orig. 44. b.
Briton. l. 1. c. 4.

*Prohibition lies
where the
Bounds of the
Parish are con-
troverted.*

2 Rolls 291.
l. 1. 5. 4.

But in case the Bounds of the Parish come in dispute in the Ecclesiastical Court, that is, if the Party assessed aver that the Land for which he is assessed lies in another Parish, and not in the Parish where it is assessed, if the Party be contentious he may have a Prohibition, and try it at Common Law.

And

And if the Parishioners, when they come together at such meeting, refuse or neglect to joyn in making such Assessment, or refuse to meet, I conceive the Churchwardens, having just cause for such Assessment, may proceed alone.

What to be done, if the Parishioners will not make a Levy.
Cap. Archidiacon.
verb. Subpœna.

For if the Churchwardens shall neglect to make the Repairs when duly admonished by those that have the power to visit, within a certain time the Ordinary or other Visitors shall limit, they may proceed against the Churchwardens by Ecclesiastical Censures, to compel them to do it: And the Law never compels any body to do a thing, they have not means to effect.

And it should seem in this case, That the Parishioners are likewise punishable by the Ecclesiastical Judge, for their neglect in this kind.

But some are of Opinion, That the Churchwardens cannot proceed alone, but must compel the Parishioners to do it by Ecclesiastical Censures: *Ideo quare.* 1 Mod. Rep. 97. 194. 236. 1 Ventris 367.

And it should seem, that by custom Lands 2 Rolls 308. in a foreign Parish may be charged to the repair of the Church. v. 20.

And if any person find himself aggrieved at the inequality of any such Assessment, his Appeal is to the Ecclesiastical Judge, who is to see Right done.

How to be relieved against unequal Assessments.
2 Roll. 289.
H. 6. 5. 67. a.

M 3

Every

And

*Landlords not
taxable for
their Rents.*

Every one that holds any Lands within the Parish, is in Judgment of Law a Parishioner, chargeable to this Tax; but the Landlord, in respect of the Rent he receives, is not chargeable to the repair of the Church; nor in that respect can be said a Parishioner.

*These Taxes are
upon the person
in respect of
the Land.*

And these Levies are not chargeable upon the Land; but upon the person in respect of the Land, for the more equality and indifferency.

*Who is charge-
able to the Or-
naments.*

But there has been some question made, Where one that holds Lands in one Parish, and resides in another, may be charged to the Ornaments of the Parish-Church where he doth not reside? And some Opinions have been, That Foreigners are only chargeable to the Shell of the Church; but not to Bells, Seats, or Ornaments.

Rolls 291.k.
1.2.
2 Brownl. 10.

*Landlords
chargeable.*

But I conceive the Law to be clear otherwise, and that the Foreigner that holds Lands in the Parish, is as much obliged to pay towards the Bells, Seats and Ornaments, as to the repair of the Church; otherwise there would be great confusion in making several Levies, the one for the repair of the Church, the other for the Ornaments, which I have never observed to be practised within my knowledge.

*Land holders
are, and the
Reasons.*

Secondly, It is possible tht all, or the greatest part of the Land in a Parish may be held by Foreigners, and it were unreasonable in such case to lay the whole charge upon the Inha-

Inhabitants, which may be but a poor Shepherd.

Thirdly, The Reason alledged against this charge upon the Foreigners, is chiefly because the Foreigner has no benefit by the Bells, Seats and Ornaments.

Which receives an Answer in *Jeofferies* Co. 5. 67 b. Case; for there it is Resolved, That Land-holders, that live in a Foreign Parish, are in Judgment of Law Inhabitants and Parishioners, as well in the Parish where they hold Lands, as where they reside; and may come to the Parish-meetings, and have Votes there as well as others.

For Authorities in the Case, it is clear by Lindw. Cap. the Canon, That all Land-holders *in ipsis* Licet parochiani. *degentes, vel alibi, ad quavis onera Parochianis ipsos ipsam Ecclesiam & Ornamenta ejusdem concernentia, & eis in his de jure vel consuetudine incumbentia, consideratis possessionum & reddituum hujusmodi quantitatibus, cum cæteris parochianis Ecclesiarum prædictarum, quoties opus fuerit, contribuere teneantur.*

And I have seen a Report under the Hand Authorities. of Mr. *Latch*, that it was Resolved in *Willmor's* Case, H. 6. *Fac. B. R.* and in *Chester's* Case, 10 *Fac.* That a Foreigner that held Lands in another Parish wherein he did not reside, was as much chargeable to the ancient Ornaments of the Church, as Bells, Seats, &c. as those that lived in the Parish; but that such Land-holders could not be charged to new Bells, Organs, &c.

1 Bulstr. 20.

And Mr. *Bulstrode* reports a Case about the same time, That the Chief Justice *Fleming*, and Mr. Justice *Williams*, were of the same Opinion, and gave this Reason, That the Foreigner might come to Church if he pleased.

Quære.

And having said thus much to this matter, I must leave it a *Quære* amongst these diversities of Opinions.

2 Rolls 291.k.

4.
Addir. Poph.

197.

If some should
be omitted in a
Levy.

2 Rolls 291.k.

3. cor t. a.

Ibid. 290. H. 10.

It hath been resolved, That the major part of the Parishioners may make a Levy for new Bells or Organs.

But if in the making a Levy for the repair of the Church, some of the Parishioners or Land-holders are omitted, if the Churchwardens shall sue upon such a Levy, a Prohibition lies in the case; *tamen quære.*

Though generally all the Parishioners and Land-holders within a Parish ought to be taxed towards the Repairs of the Church, as has been said; yet that Rule admits some Exceptions.

Who may be
free'd from these
Levies.

Cap. Licet pa-
rochiani.

The Rector and
Vicar.

The Founder.

H. 3. Car. 1. B. R.
per Henden.

For, *First*, the Rectory or Vicarage which is derived out of it are not chargeable to the repair of the Body of the Church, Steeple, publick Chappels or Ornaments, being at the whole charge of repairing the Chancel.

Secondly, The Founder of the Church may prescribe, That in respect of the Foundation, he and his Tenants have been free'd from the charge of repairing the Church.

Thirdly,

Thirdly, It hath been resolved, that the Inhabitants of a Chappelry may prescribe, That in consideration that they have time out of mind paid Three shillings four pence, to the Repair of the Mother-Church, or at their own charge repaired a certain part of the Mother-Church, they have been free'd from all other charges about the Repair thereof.

Those of a Chappelry.
Hob. 67.
2 Rolls 290. l.
1, & 2.

But a Prescription by the Inhabitants of a Chappelry, That because they have time out of mind repaired some part of the Fence of the Church-yard, they have been free'd from the Repair of the Mother-Church, has been disallowed.

Noy 41. contra
2 Rolls 290.
l. 1.
Ibid. 311. a. 1.
Marsh. 91.
Hob. 67.

And yet there hath been some Resolutions, that the Inhabitants of a Chappelry may prescribe, That in consideration they have repaired their own Chappel time out of mind at their own charge, that they have been free'd from the charge of Repairing the Mother-Church; but there being Opinions to the contrary, I must leave it as a *Quere*: But the better Opinion seems against such Prescription.

2 Rolls 290.
H. 7, & 8. cont.
Bulst. 1. 16. 17.
accord. and so
it was Resolved
P. 42 El. B.R.
between the
Chappelry of
Coxwell and
Church of
Faringdon in
Berkshire.

If a Petit Chapman take a Standing weekly in the Market to sell his Wares, he shall not for this be charged to the Repair of the Church.

Quere.
2 Rolls 289.
H. 5. Andrews
versus Hutton.
H. 4. Car. 1.
Hetley 133.

A Prescription, That the Arable Lands within a Parish had time out of mind been only charged to the Repair of the Church; has been disallowed; for the Houses are as well chargeable as the Land.

If

Hob. 67.
Churches united,
how to be repaired.

If two Churches be united, at the Common Law, the Repairs of the several Churches shall be made as before the Union.

But by the Stat. 4 & 5 W. & M. c. 12. the Parishioners of the Church united are made contributory to the Repairs and Ornaments of the Church to whom the Union is made. *Vide Stat.*

And so much concerning the Repair of Parish-Churches and publick Chappels annex'd to them; and as for the Repair of other Chappels, I shall defer till I come to speak of Chappels.

I did purposely omit, in the former Edition of this Book, to speak of the Repair of Chancels, lest I should have raised a Question I could not determine; but the Point has lately come in question Judicially, and I shall tell the Reader now what I have learned on this Subject.

Regularly, the Repair of the Chancel, both by the Canon Law and Custom of *England*, is to be made by the Rector or Parson of the Parish, which he is compellable to do by Ecclesiastical Censure, Suspension and Sequestration.

But the great Question in this case is, where there is an Impropietor, how to compel him to do it, the Rectories and Tythes in that case being become Lay-fee: But this Point coming lately in question in the *Common-Pleas*, between *Walwin* and *Awbry*, it was agreed to both by the Counsel that argued on both sides, and the whole Court.

First, That the Impropietors are chargeable with the repairs of the Chancels.

Se-

P. 29 Car. 1.
rot 372. C B.

Secondly, That they may in the Ecclesiastical Courts be compelled by Ecclesiastical Censures to repair them.

But the great Question was, Whether the Bishop might sequester the Tythes, they being now become Lay-fee? Which Point, by reason of some miscarriage in the Pleadings, did not receive a determination.

Many Presidents were shewed in Point, That impropriate Tythe had been sequestred by the Ecclesiastical Judge in this case, both before and since the War; and the better Opinion seemed to be for the Sequestration, it being agreed that the Ecclesiastical Court has Jurisdiction of the cause, and that being one of the ordinary Processes of Court.

The next thing to be spoken of is the *Seats in Churches*, built for the ease of the *Churches*. Parishioners to sit, kneel, and stand in, for the hearing the Word of God read and preached, and joyning in Prayers, and other Religious Duties, with the other Parishioners.

These are to be built and repaired as the *By whom to repaired*. Church is to be, at the general charge of the Parishioners, unless any particular person be chargeable to do the same by Prescription.

The Seats ought to be regular, and of *In what manner to be built*. a moderate height, that the Behaviour of the Parishioners may the better be observed; and if any Body of their own *Who may build Seats*. Heads shall presume to build any Seat in the Church without the License of the Ordinary, or consent of the Minister and Churchwardens, or in any inconvenient place,

**Dantries Case,*
T. 2. Jac. C. B.
31 H. 4 12. a.
Cro. Jac. 667.
21 H. 7. 21 b.
Seats cut or
pull'd down,
who shall have
the Materials.

8 H. 7. 12.

place, or too high, it may be pulled down by Order from the Bishop, or his Archdeacon, or by the *Churchwardens, by the consent of the Parson; for the Freehold of the Church, and all things annex'd to it, are in the Parson: And therefore if any one presume to cut or pull down any Seat annexed to the Church, he may have an Action of Trespass against the Misdower (though he formerly set it up) if he do it without his consent or order from the Ordinary; but if the Seat be set loose, he that built it may remove it at his pleasure, as I conceive.

What the Parson may do in the Church.

But though the Freehold of the Church be in the Parson, yet he cannot pull down any of the Seats anciently erected, or of late erected; but by License from the Bishop, or by the consent of the Churchwardens.

Noy 108.

If any Seats annex'd to the Church be pulled down, the Property of the Materials is in the Parson, and he may make use of them if they were placed in the Church by any one of his own head, without legal Authority; but for the Seats erected by the Parishioners, by good Authority, I take it, the Property of the Materials upon removal is in the Parishioners.

Who may dispose of the Seats.
2 Rolls 238.
8. 1, 2.

The Churchwardens, with the Approbation of the Parson, may by Custom dispose of the Common Seats, built at the charge of the Parish, and place the Parishioners

oners therein, according to their degrees and qualities, but no such Custom can exclude the Bishop from a Temporary disposition of such Seats: But the Bishop cannot grant Seats to a Man and his Heirs, because they must be attendant to the Houses.

3 Poph. 140.
Hob. 69.
Gratrix & alii
versus Beardes-
ley, H. 30 &
31 Car. 2. B. R.
2 Rolls 288.]

But the Bishop has no power to dispose of the Seats in any private Chappel next to the Church, that is not maintained and repaired at the Parish charge.

85.
Parsons Law
113.
Hob. 69.

The Seats in the Chancel are properly in the dispose of the Rector or Parson; but it should seem that a Parishioner may prescribe for a Seat there.

Holt vers. Ellys.
Noy 133.

And note, That all that has been said before of Seats, must be intended of such Seats as no particular Parishioner has a right to by prescription; for whereforever any Parishioner is Owner of an ancient Messuage, to which any Seat has been used by prescription time out of mind; there the Ordinary, Parson or Churchwardens, have nothing to do in the disposing of such Seats.

About Prescriptions for Seats in Churches, the Law has been controverted; for sometimes it has been held, That the Owner of an ancient Messuage might prescribe to have a Seat in the Isle of a Church, which himself repaired: After it went further for a Seat in the Body of the Church, which was repaired by him that prescribed to have it.

Cro. Jac. 667.
Co. 12. 106.

3 Inst. 207.
Noy 129.

But

But the Law is now settled in this Case, That a Man that is Owner of an ancient Messuage might prescribe for a Seat in any part of the Parish-Church, within which Parish such Messuage stands, although he have not used to repair it.

Buxton versus
Bateman.
T. 4 Car. 2. B. R.
rot. 463.

And this was Resolved in an Action of the Case brought by *Buxton* against one *Bateman*, for disturbing him in a Quire, in the Body of *Yolgreave* Church in *Derbyshire*, which *Buxton* claimed by prescription to his House, by all the Judges of the *King's-Bench*, and after affirmed in a Writ of Error in the *Exchequer Chamber*, so that this Point is now settled by all the Judges in *England*.

Vile Syderfin,
88, 89, 209.
Malement Report.

See 3 *Keeble* 754. how Prescription to a Seat ought to be pleaded.

Carleton versus
Hutton,
Noy 78.

And as a Man may prescribe for a whole Seat in a Church, Isle or Quire; so he may prescribe for the first, second, or other sitting or place in a Seat.

And in all these cases of Prescriptions, the Ordinary has nothing to do; but the matter is solely determinable at Common Law.

Co. Ent. 8. b.
Prescription for
Burying.

And as a man may prescribe to have a Quire, Isle, or Seat in a Church; so he may prescribe to an ancient Messuage, to have the sole Burial of the Dead, in such Isle, Quire, or Place in the Church.

Who may be
buried in the
Church.
Spelm. Conc.
590 n. 9. 451.
n. 29. 545.

Anciently none were admitted to be Buried in the Church but Priests, and those that were of clear life and conversation.

But

There was likewise anciently a payment due for those that were buried, called *Symbolum animæ*, or *pecunia Sepulchralis*; and this was paid though the Body was buried in another Parish.

Ibid. 517.
Payment for Burials.

But by the Canon Law, *Interdictum est omnibus Christianis terram mortuis vendere & debitam sepulturam denegare*. But this must be intended in the Church-yard; for by another Canon in the same Council it is expressly decreed, *Quod nullus Laicus in Ecclesia sepeliatur nisi in Cœmeterio*.

Nothing to be paid for Burials.
Conc. Triburienfis.
Can. 16.
Can. 17.

And by the same Council it is decreed, That *ubi decimas persolvebat vivus, sepeliatur mortuus*.

Where one shall be buried.
Can. 15.

Anciently there were no Church-yards in Cities, nor burying of the Dead; so that the Archbishop of Canterbury could not be buried in his own Cathedral, till Cuthbert Archbishop of Canterbury obtained License from the King, that the Archbishops might be buried in the Cathedral at Canterbury.

No Church-yards in Cities,
Spelm. Concil. 290.

The Church-yards are of common right to be fenced by the Parishioners.

2 Inst. 489.
Co. 6. 67.

By the Custom of England, every person (except such as are afterwards excepted) may at this day be buried in the Church-yard of the Parish where he dies, without paying any thing for breaking the Soil.

Who may be buried in the Church-yard.
13. q. 2. quæst. 1.
& tribus, &c.
sepeliendum.

And

But

*Who in the
Church.*

And by the Custom of *England*, every Parishioner (except as hereafter is excepted) may be buried in any common part of the Church or Chancel, paying the accustomed Fee to the Parson for breaking the Soil, which for most part is Three shillings and four pence in the Church, and Six shillings and eight pence in the Chancel; and this is only for breaking of the Floor, and that's the reason that in some places the Churchwardens have the Fee for breaking up the Church, though of common right it belongs to the Parson; and in this the custom must be observed.

Spelm. Concil.
564. leges Can-
nuti, p. 20.

*Who may set
up Tombs.
3 Inst. 202.*

Sir *Edward Coke* is of Opinion, That any person may erect a Tomb or Monument for the dead in the Church, Chancel, publick Chappels, or Church-yards, in a convenient place; (but, I conceive, it must be intended by License of the Bishop, or consent of the Parson and Churchwardens:) And that if if any body break it, the party that set it there may have an Action against those that break or pull it up, or deface it: And after the death of those that set it, the Heir shall have the Action.

*What remedy
if broken.*

Mere 878.
3 Inst. 202.

*Who may not be
buried in the
Church, or
Church-yard.
13. q. 2. placuit
& ibid. staten-
dam, & ibid.
quibus.*

Some persons are denied Christian Burial, and therefore such persons are excepted in what is said before, and may not be buried in the Church or Church-yard, without special License from the Bishop.

That

That is, such persons as Murder themselves, die Excommunicated; those that die in any mortal Sin, Sacrilegious persons and Usurers; but of Usurers the Canon holds not in *England*.

For Grave-stones, Winding-sheets, Coats of Arms, Penons, or other Ensigns of Honour, hanged up, laid or placed in memory of the Dead, the property remains in the Executors, and they may have Actions against such as break, deface, or carry them away; or an Appeal of Felony. See *Co. 1 Inst. 18.b.* The Heir shall have the Action, and by some the Wife, or Executors, that erected them against those that deface them in their time.

Grave-stones,

&c.

See *Grævii.*

Rom. Ant.

Vol. 12. pag.

1316.

More 878.

9 E. 4. 14. 2.

Co. 12. 113.

3 Inst. 110, &c

202.

The property of the Bells, Books, and other Ornaments of the Church, is in the Parishioners, and in the custody of the Churchwardens, who may maintain an Action of Trespass against such as shall wrongfully take them away, and the Successors may sue this Action for the taking away in the time of their Predecessors, and the damages recovered shall be to the use of the Parishioners; but they may declare * *ad dampnum ipsorum*, or *dampnum parochianorum*, and either way good, and the Release of one Churchwarden shall not bar his Companion; or they may have an Appeal of Robbery, for stealing the Goods of the Church.

Whose the Bells,

&c. are.

12 H. 7. 27 b.

37 H. 6. 32.

8 H. 5. 4.

10 H. 4. 9.

Who may have

an Action for

taking them.

* *Cro. El. 179.*

8 E. 4. 6. b.

† *Cro. Jac. 23.*

By the Laws of *England*, in the time of Popery, if a Stranger had taken my Goods, and offered them to an Image in a consecrated Church; this had made as good a change of the property of my Goods, as though I had sold them in a

Property chang-

ed by Offer-

ing.

34 H. 6. 10.

Co 10. 91. a.

N

Market-

Market overt; but if I found the Goods after in the Wrong doers possession, I might take them again.

Goods may be given to the Church.

11 H.4.12.
Cro.Car.343.

A man at this day may give or dedicate Goods to God's Service in such a Church, and deliver them into the custody of the Churchwardens, and thereby the property is immediately changed, and the Churchwardens may have an Action for the taking them away.

Reverence to the Church and Church-yards.

There has always been great Reverence given to Churches and Church-yards, and other places consecrated to God's Service; and anciently Churches and Church-yards were Sanctuaries for Traytors, Murderers, Robbers, Thieves, and others Malefactors; and many Laws were made for the regulation of them, and restraining that privilege, till at last Sanctuaries, with great reason, were totally taken away; for they were not used like the Cities of Refuge under the Law, for those that unawares killed others, but for all People, be the Crime never so horrid.

Numb.35.
v.11.

Where Sanctuaries were taken away.

Stat. 26 H.8.
cap.13.

St.27 H.8.c.12.

* Frustra implorat Ecclesie auxilium qui in ipsam deliquit,

In the 26th of H.8. Sanctuaries were taken away in High Treason, in the 27th of H.8. they were taken away in wilful Murder, Rape, Burglary, Robbery in the Highway, or in any House, or in any *Church or Chappel, and in wilful burning any House or Barn with Corn.

c.17. q.4. Ad Episcopos.

But

But by a Statute made in the 21th year of King *James* they were finally taken away and abolished, they having too long continued for the protection of the greatest Malefactors, a thing unfit for hallowed places.

St. 21 Jac. c. 28.
Sanctuaries
finally taken
away.

But that Churches and Church-yards should not be prophanely used, is evident from the example of our Saviour, who cast out those that bought and sold in the Temple, and overthrew the Tables of the Money-changers, and the Seats of them that sold Doves; telling them, *My House shall be called of all Nations the House of Prayer, but you have made it a Den of Thieves.*

Mark 11. v. 15.

And in the Council of *Mentz* it is forbid, *Ut in Ecclesiis aut in domibus Ecclesiarum vel atriis placita secularia minime fiant.*

Courts not to
be kept in
Churches or
Church-yards.
Can. 40.

And by a Canon made in the sixth General Synod at *Constantinople*, buying and selling is forbidden in Churches and Church-yards, wherewith a Canon of our own, made in the time of King *James*, agrees.

See Chamber-
len's Justice,
475.
*Church-yards.
Fairs and Mar-
kets not to be in

And by a Statute made in the 13th year of *Edward* the First it is enacted, *That Fairs or Markets should not be kept in Churches or Church-yards, for the Honour of the Church.*

Churches or
Church yards.
Can. 75.
Can. 89.
Stat. Winton.

There is a Canon to this effect, *Quod nullus secularium, nec in Ecclesia, nec infra atrium ipsius Ecclesiae, quaecumque scandalum, aut si multates excitare praesumat, nec arma trahere, aut quemcumque ad vulnerandum, aut interficiendum appetere, quod si fecerit a communione pri-
vetur.*

Conc. Cabilo-
nensis, Can. 17.
No fighting,
&c. in Churches
and Church-
yards.

5 Ed 6. cap. 4.

And to the same effect there was a Statute made in the Fifth year of *Edward* the Sixth, ' That if any Parson, &c. should by ' Words openly quarrel, chide or brawl, ' in any Church or Church-yard ; that then ' it should be lawful for the Ordinary of the ' place, the matter of Fact being proved by ' two Witnesses, to suspend a Lay-person, ' *ab ingressu Ecclesie*, and a Clerk from the ' exercise of his Office as long as he shall ' think fit, according to the quality of the ' Offence.

' And that if any person shall smite or ' lay violent Hands upon any other in the ' Church or Church-yard, then *ipso facto*, ' every such person shall be deemed excom- ' municate.

Chamberlens
Justice, 475.
*No striking or
drawing Wea-
pons in the
Church or
Church-yard.*

' And if any person, &c. maliciously ' strike another in any Church or Church- ' yard, with any Weapon, or shall draw ' any Weapon in any Church or Church- ' yard, to the intent to strike any other ' therewith ; the party thereof convicted ' by Verdict, or two lawful Witnesses, be- ' fore the Justices of Assize, Oyer and Ter- ' miner, or Justices of the Peace in their ' Sessions, shall have one of his Ears cut ' off ; and if he have no Ears, then to be ' marked in the Cheek with an hot Iron, ' with the Letter F, and *ipso facto* excom- ' municate.

It may be a Question, What the meaning of these words, *Ipsa facto* Excommunicate, in this Act shall be understood ; Whether it shall be without Sentence declaratory, or no? Which is made a *Quare* in *Dyer* ; but by the Canonists there must be a Sentence declaratory, or Conviction. *Cro. El.* 919. See the same Book, pag. 680. See also 3 *Inst.* 177. & 6 *Rep.* 29. *b. contra.*

Vi. Dy. 96. p. 48.
Ipsa facto.
Dy. 275. p. 48.

Lindwood, Cap.
Quia incontin-
entia, verb.
Ipsa facto.

And the Law so abhors violence and force to be used in Churches and Church-yards, that it will not admit a man to strike again in his own defence in a Church or Church-yard ; and therefore the Plea of *De son assault demesne*, is not allowed for a good Plea in that Case.

De son assault
demesne, no
Plea in a
Church, &c.
Cro. Jac. 367.

And to make an Arrest in a Church or Church-yard, immediately after Divine Service, when it may be done elsewhere, is Indictable and Finable.

Arrest in
Churches, &c.
punishable.
Cro. Car. 602.

And yet it hath been held, That there may be a Way through a Church or Church-yard.

Ways through
Churches, &c.
18 E. 4. 8. a. 1.
2 E. 6. cap. 4.

By the Statute of 1 E. 6. the benefit of the Clergy is taken away from such as steal any Goods out of any Church or Chappel.

Clergy taken
away in Sacri-
ledge.

For the punishment of such as disturb the Minister in the Church, whilst he is reading Divine Service, or arresting the Minister whilst he is attending Divine Service, see in the 11th Chapter before, and *Stat.* 50 E. 3. cap. 5. and 1 R. 2. cap. 15.

And so much for the Privileges of Churches and Church-yards.

Officers of the
Church.

Kitchin 194.

De Clericis,

lib. 1. cap. 13.

Distinct. 23. c.

Quorundam

Clericorum &

ditt. 25. per-

leclus.

Ostarius may

be taken for a

Clerk or Sexton.

The last thing I have to speak relating to Churches, is the Officers belonging to the same, which in time of Popery were many; as *Ostarii, Lectores, Exorcistæ, Acolythi, Psalmistæ, Cantores, &c.*

He that minds to know the several Duties of all these Officers, or Orders, may satisfy himself in *Bellarmin's* Disputations, or in *Gratian*, with the manner of their Ordinations.

Amongst these the Churchwardens and Parish-Clerk or Sexton, who perform several of these Offices, are not reckoned, and those are now the only Officers of the Church of *England*, and of whom I am now to speak.

Churchwardens
Office.

Doct. & Stud.

118.

8 H. 5. 4.

The Office of the Churchwardens is to take care of the Repair of the Church, and has the ordering of the Bells and Seats, and is to provide all Books and Ornaments belonging to the Church, and in his custody, and in their charge are all the Goods of the Church, and they are to provide Bread and Wine for the Communion, and to see there be a decent Communion-Table, with a Table-cloth and Carpet, and Flagon, Plate, and Bowl of Silver, Gold, or Pewter, for the Service of the Church, when the Communion is Administred; they are to make Levies, and raise Money for the doing of all this in such manner as is before directed; and at the end of their Office they are to give an accompt of their Receipts, and disbursements to the Parishioners, and what remains

remains in their hands upon such accompt, ^{8 E.4.6.} with all the Goods of the Church in their custodies, they are to deliver over to their Successors.

There are many things more belong to their Office, but so well known, I need not mention them.

These Officers by a Canon made in the time of King *James* the First, are to be chosen ^{By whom to be chosen.} by the Minister and Parishioners; but if they ^{Can. 89.} cannot agree of the persons, then the Parson, Vicar or Curate, is to chuse one, and the Parishioners the other; but where the custom has been to chuse them all by the Parishioners, without the Minister, the custom must ^{26 H.8.6.} be observed, notwithstanding the Canon. ^{2 Rolls 287. f.50.}

By *Hale* Ch. Bar. *Hardres* 379. Every Parish of Common Right ought to chuse their own Churchwardens, but because the manner of Election varies, a Custom may be alledged.

There were other Officers called Side men, ^{Side-men their Office.} but they are almost laid aside; their Office is to assist the Churchwardens in doing their Duties, and they were to take care that no body should loiter or talk in the Church-yard or Church-porch, and to see that the Parishioners frequented the Church, &c. ^{Can. Jac. 90.}

The Clerk or Sexton is to be chosen by ^{The Clerks Office.} the Parson or Vicar, or in their absence by ^{Can. Jac. 91.} the Minister, who the Sunday after such Election, is by him that makes the Election to be declared, who is Elected.

—— The Party so elected ought at least ^{How to be elected.} to be Twenty years of Age, of honest Life and Conversation, and one that can write, read,

Cro Car. 510.
2 Rolls 286.
f. 42.

Parsons Law,
116.
Cro. Jac. 670.

read, and sing: His Office is to assist the Minister at Prayers, and to attend him, and to keep the Church and Seats clean, and has the keeping of the Keys of the Church to that purpose, and is to ring to Prayer, and to do many other things, which by custom belong to his Office to do.

But if such Parish-Clerk have time out of mind been chosen by the Parishioners, he must be so still, notwithstanding the Canon.

And so much for Churches, I shall next proceed to the Chappels.

Chappel, unde
dicitur.
Cowel, Min-
they, Spelman,
hoc verbo.

Chappels, in Latin *Capellæ*; about which denomination I find great diversity of Opinions amongst the Learned: Some conceiving it takes its name *à capiendo Laicos*; others are of Opinion they took that name *à capra*, because anciently they were covered with Goat-skins.

Others think they take their name *à cappa Sancti Martini*; because anciently the Kings of France, when they went to Wars, carried that Cap along with them, which was kept under a Tent, and thence called *Capella*.

Others have thought it is taken for a Chest or Repository, wherein the Relicks of Saints were preserved.

Etia, in the end
of a word signi-
fying little, and
Cap of capio,
to receive.

Amongst this variety of Opinions, I shall beg the Reader's pardon to put in my own amongst the rest, being not well satisfied with any of these.

A Chappel is a Church in smaller Character, and therefore I imagine it might be called *Capella* from the Littleness of its content or capacity to receive persons, it differing nothing from a Church, but in the dimension or content, and that the Church is the Elder Sister.

So a Chappel is of little receipt in respect of the Mother-Church.

Of Chappels there are three sorts; Free Chappels, Chappels of Ease, and Private Chappels.

Division of Chappels.

What those Chappels were that were called Free Chappels, I find likewise some difference of Opinions; for some have been of Opinion, That they were Chappels founded in Parish-Churches, and endowed by the Founder, and made free to all People to come, and therefore called Free Chappels.

Minshey. Cowel in free Chappels.

Others were of Opinion, That they were Chappels built by the Kings of this Realm, or by their Licence, and exempted from the Visitation of the Ordinary.

Others take them for Donatives, and therefore called Free Chappels, because they were freely given.

These Free Chappels, whatsoever they were, were all given to the King in the first year of *Edward* the Sixth, except some few that are excepted in the Acts of Parliament by which they were given; or such as are founded by the King, or his Licence, since the Dissolution: For it is agreed on all hands, That the King may erect a Free Chappel, and free it from the Jurisdiction of the Ordinary, or may Licence a Subject so to do.

St. 1 E.6.c.14.

Chap-

*Chappels of
Ease, Parochial
and not Paro-
chial, the dif-
ference.*

2 Inst. 362.

Chappels of Ease ; some of them have Parochial Rights to Christen and Bury, and are therefore called Parochial Chappels, by way of distinction, from others that have no such Privilege ; and these differ in nothing from Churches, but in the want of Rectories and Indowments, the Mother being to be served before the Daughter.

Those Chappels of Ease which are not Parochial, cannot Bury or Christen ; but are only used for the ease of the Parishioners, to hear the Word of God read and preacht, and to joyn in Prayers.

*Chappels how
to be repaired,
&c.*

Chappels have like Officers for the most part as Churches have, distinguished only in name ; and these Chappels must be consecrated by the Bishop as Churches are ; and the Repairs must be made by Assessments on the Inhabitants and Land-holders within the Chappelry in the same manner as for the Repair of Churches, and are visitable by the Ordinary, and the like Appeals to the Ordinary for unequal Assessments ; but all this must be intended of ancient Chappels, and where this course hath been used : For if there be Land given for the Repair of them, or any Land or Estate charged by prescription to the Repairs of them, then the custom must be observed.

But of new Chappels of Ease there may be some question, Whether the Ordinary can compel the Inhabitants to repair the same.

But

But when a number of People have for 44 E. 3. 18, 19. their Ease joyned together, and erected a Chappel, and procured the Bishop to consecrate it (which was the Original manner of erecting Churches) it should seem in reason, that the Bishop should have the same power to compel the Repair, as he has to Visit it.

But I conceive there is no doubt, but those of the Chappelry, or the major part of them, may agree to make an Assessment for the Repair of such Chappel, and agree that the Collector for default of payment should distrain for it; and I conceive such By-Law for a publick good, made by the greater number, shall bind the rest.

Co. 5. 63, 64 a.
Co. 8 127.
It is a Maxim at the Civil Law, Refertur ad universos quod publice fit per majorem partem.

The Cure of Chappels of Ease in many places, is to be performed by those that have the Cure of Souls in the Parish; and in some places they are indowed with Lands or Tythes, and in some places by voluntary Contributions. * And Land or Tythes may be appendant to a Chappel.

Who has the Cure of Chappels.
* Rast. Entr.
Trespass in dismes 4. and in Præmunie in Rome 4.
1 Rol's 110 a.
Co. 5. 72. b.
22 H. 6. 46. b.
Rast. Entr. 2 b.

Whosoever by Law or Custom is bound to provide Chaplains for any such Chappel, may be compelled to do it in the Ecclesiastical Courts, or an Action upon the Case lies against him at Common Law, to recover Damages for not performing; but this must not be intended of a publick Chappel.

The Offerings made at any Chappel are to be rendred to the Mother-Church; but this must not be intended where by custom, time out of mind, the Chaplain has had them, for there the Canon will not bind; nor

Offerings at Chappels.
Othobon cap.
Gratia qua.

nor does the Canon extend to Chappels of late erection, unless they be with a *Salvo jure matris Ecclesiæ tunc concessæ*.

How a Chappel may become a Church.

47 E.3.4.b.

5.a.

2 Inst.364.

If the Patron of a Chappel Presentative present to it by the name of a Church, and the Clerk by that Presentment be instituted and inducted, it hath lost the name of a Chappel, and gained the name of a Church: *Quære*, What other alteration is made thereby.

Chappels annex'd to Churches how to be repaired.

2 Inst.489.

Publick Chappels annex'd to Parish-Churches, are (as hath been said) to be repaired by the Parishioners as the Church is; but not if any other person be bound by custom to repair them.

Quære Imp. will lie of a Chappel.

2 Inst.363.

F.N.B.33.E.

And note, That a *Quære Impedit* will lie of a Chappel.

In what Cases the Inhabitants of a Chappel shall be free'd from the repair of the Mother-Church: See before in this Chapter.

Private Chappels.

Private Chappels are such as Noble-men, and other Religious and Worthy Persons, have at their own private charge built in or near their own Houses, for them and their Families to perform Religious duties in; these Private Chappels and their Ornaments, are maintained at those Noble and Worthy persons charge to whom they belong; and Chaplains provided for them by themselves, with Honourable Pensions; and these anciently were all consecrated by the Bishop of the Diocess, and ought still to be so; but I doubt many have been neglected of late time.

The last thing I have to speak of, relating *Church-yards,* to Churches, is the Church-yard, in Latin *&c.* *Cæmeterium*, from the Greek, *Quasi dormitorium, quia mortui dicuntur dormire usque ad resurrectionem.*

It is the ground wherein the Church is ² Inst. 489. erected; the Freehold thereof is in the

Parson; so that the Trees, Grass, &c. growing in it are his; but he may not cut down the Trees but in especial Cases, as hath been shewed elsewhere. ^{Doct. & Stud. 118.}

The Fences are to be repaired at the charge of the Parishioners, or in such manner as by custom has been used: And the Visitors in their Visitations are to inspect the Repairs, and to compel the Reparations, if need require. ^{Cap. Quamvis lex naturæ. 2 Inst. 489.}

It is consecrated Ground, and participates of all the Privileges belonging to the Church before-mentioned, and the Parishioners may here freely bury their Dead without contradiction, or paying any thing for breaking the Soil.

It is not to be put to any prophane Use, to have Swine kept in it, or Muck-heaps laid in it; but kept decently, as a Place dedicated to God's Service.

C H A P. XIII.

Of Parsonages, Vicarages, Sine Cura's and Donatives, and of the Indowments of Vicarages, and how a Parsonage and Vicarage may be re-united; and many other things relating to Parsonages, Vicarages, and Sine Cura's.

A Parsonage or Rectory, quid.

Spelmans Gloss. verbo Rector 12.

*15 H.7.8 a.
21 H.7.21. b.
Edgar versus
Sorrel, M. 5 Car.
B. R.*

Ibid.

A Parsonage, or Rectory, is a certain portion of Land, Tythes and Offerings, established by the Laws of this Kingdom, for the maintenance of the Minister that hath the cure of Souls within the Parish where he is Rector, or Patron, and properly comprehends, *Integra Ecclesia parochialis, cum omnibus suis juribus prædiis, decimis, aliisque proventuum speciebus: Alias vulgo dictum beneficium.* And sometimes it is taken *pro Mansione, seu domicilio Rectoris.*

And though properly a Rectory or Parsonage doth consist of Glebe-Land and Tythes with the Offerings; yet it may be a Rectory, though it have no Glebe but the Church and Church-yard; and in some places, as in *London*, and other great Towns and Cities, there may neither be Glebe nor Tythes; but Annual Payments and Offerings

ings in lieu thereof, and by the Grant of a Rectory all the Glebe, Tythes and Offerings will pass.

A Vicarage, is a Cantel or Portion of the Rectory set out by the Patron, Parson, and Ordinary, for the maintenance of a perpetual Vicar, who as Vicegerent of the Parson, hath the cure of the Souls within the Parish where he is Vicar: But a Vicarage may consist of Land or Tythes alone, or of Glebe, Tythe and Offerings, or in an Annual Pension without Glebe or Tythes; and such Pensions have been limited by several Canons, first to five Marks, after it was extended to six Marks, and lastly to eight.

Cap. Quoniam
autem verbo s.
q. marcarum.

A Vicar can have Tythes but by Gift, Composition, or Prescription; for all Tythes *de Jure* do appertain to the Parson. *March. Rep. 11.*

Generally Vicarages are indowed with Glebe and Tythes.

Of Indowments, some are beyond all time of memory, that is, so long ago, that it is not known in what time or age the same was made, and in such case it shall be presumed, that the Vicar was indowed with such share of the Rectory, Tythes and Offerings, as the Vicar and his Predecessors have enjoyed by all the time of the memory of any Man.

Indowments
before and
within memory.

But if the Indowment it self be extant, See *infra* 193. then the Vicar must be content with such part of the Rectory as he is thereby indowed with.

But

How to be expounded.

But if these Indowments be ancient they shall be expounded according to the usage since.

2 Rolls 335.7.

And therefore if a Vicar were anciently in the time of *Henry* the Third, or before, indowed *de decimis garbarum*, arising in such a Village, Hamlet or Place, and have by colour of this Indowment, as long as any body can remember, had the Tythe-Hay as well as Tythe-Corn of the same Villages, Hamlets and Places, it shall be presumed that in those days Hay past by that name.

Ibid. 335.8.

Reynells versus Green M. 10
Jac. B.R.

So if a Vicar were anciently indowed *de minutis decimis*, and have by colour of this Indowment, by all the time of memory, had the Tythe of some small parcel of Wood; although Tythe of Wood in its own nature be accompted a great Tythe, yet the Vicar shall enjoy the Tythe of this Wood by reason of the usage.

Hetley 70.135.

If a Vicarage were anciently indowed *de Altaragio*, which properly signifies the Offerings at the Altar; yet if the Vicar, by colour of this Indowment, by all the time of memory have enjoyed the small Tythes, he shall have them still.

2 Rolls 234.7.

335.4.

Owen 74.

If a Vicar be indowed of all the Tythes arising in the Parish (except Corn,) and certain Fields or Grounds in the Parish, have time out of mind been sown with Corn, till of late they have been planted with Hops, or sown with Saffron, Wood, Rape, &c. the Vicar shall have the Tythe, and not the Parson.

And

And if the Vicar be indowed of all the white Tythes, or small Tythes arising, renewing, &c. within the Parish, he shall not by this Indowment have the small Tythes arising upon the Glebe-Lands of the Rectory, though they should afterwards be severed from the Rectory.

2 Rolls 335.
2 & 3 C10.
Eliz. 578.
More 457.
Hetley 335.
Winch. 70.

And it hath been Resolved, That upon a general Indowment of a Vicarage, the Vicar shall not pay the Tythes of his Glebe-Land to the Parson.

Vicars shall not pay Tythes of the Glebe.
Cromptons Case.
P. 7. Car. 1. B. R.
Matter upon Indowments.
2 Rolls 335.5.

If the Vicar be indowed of all the small Tythes, and after Lands that have been sown with Corn, or mowed for Hay, time out of mind, whereof the Parson hath had the Tythe, and these Lands are since converted to Hop-yards, or sown with Saffron, Wood, Rape, &c. the Vicar shall have the Tythes, and not the Parson: For the Indowment goes not to the Lands, but the Tythes.

A Vicar enjoyed a Tythe time out of mind, which was not in his Indowment; and Adjudged good, and shall be intended an Augmentation made by the Parson.

Hardieffs 328.
329.
See supra 191.

If a Vicar be indowed of all the Tythes arising upon a Mannor, he shall by such Indowment have not only the Tythes of the Demesne and Tenements, but also of the Freeholders Lands within the Mannor.

2 Rolls 235.6

The Parsonage of *Luffenham* in *Leicestershire*, the 22th of *Edward* the Fourth, was appropriated to the Abby of *Sully*, upon condition that a Vicarage should be indowed: A Vicar from time to time ever since was presented and paid First-fruits, but no indowment now extant, it shall now be intended that it was indowed.

The Indowments of Vicarages have been always favoured at Law, the Vicars for the most part having the cure of Souls.

Upon what occasion Vicarages were indowed.
Selden de Decimis, 371, 372.

Indowments of Vicarages were for the most part made upon the appropriating of Churches to Religious Houses, &c. and upon the Appropriation they did usually assign some small Portion of the Rectory to maintain a perpetual Vicar to serve the Cure, and took the rest of the Rectory to the use of Abbies, &c.

But in process of time the Abbots, &c. grew better Husbands, and took the whole Rectories to themselves, without indowing of any Vicar, and served the Cures by their own Monks and Fryars; by which means Hospitality was neglected, the Churches and Rectory Houses dilapidated, the Minister often wanting; whereupon the Statute of 15 R. 2. and 4 H. 4. were made, for the making void such Appropriations as were made without competent Indowment of Vicarages, and likewise against the appropriating of Vicarages; but Vicarages indowed before those Statutes, might notwithstanding those Statutes have been appropriated.

15 R. 2. cap. 6.
4 H. 4. cap. 18.

Bretton versus Ward.
M. 17 Jac. B. R.

But

But though for the most part Vicarages were indowed upon Appropriations; yet sometimes the Parsons, Patrons and Ordinaries did indow Vicarages without any Appropriation of the Parsonage: And if the Vicar were charged upon such Indowment with the Cure, as for the most part they were, then the Parsonage became a *Sine Cura*; of which more hereafter.

The Parson, or Appropriator, is Patron of the Vicarage by common Right; yet nevertheless a Lay-man might have been Patron of a Vicarage as well as the Parson, and so might the King; and the Advowson of a Vicarage may be appendant to a Manor by Prescription, and it shall be intended it was granted by the Parson before the time of memory.

*How an Impro-
priation may be
restored.*

17 E.3 51.b.
11 H.6.18 b.
39 E.3.33.a.
19 E.2. *Quare
Impedit* 178.
2 Rolls 336.
E 5.
14 E.3.8,16.

It should seem that at the Common Law, before the Statute of 14 E. 3. the Freehold of the Vicarage remained in the Parson, and that the *Præcipe* was to be brought against the Parson; and before that Statute the Vicar could not have had a *Juris utrum*, and he shall still have aid of the Patron, Parson and Ordinary.

*Freehold of the
Vicarage, in
whom.*

6 E.3.50.a.
3 E.3.17.b.
9 E.3.8.b.

And as the Vicarage was part, and taken out of the Parsonage, so it may be again re-united.

For if the Profits of the Parsonage or Vicarage fall into such decay, that either of them by it self is not sufficient to maintain a Parson and Vicar, they ought again to be re-united.

*How a Vica-
rage may be
re-united.*

31 H.6.14.a.
40 E.3.28.b.

2 Rolls 337.
h. 1.

And the Parson and Ordinary, in the time of the Vacation of the Vicarage, may reunite the Vicarage to the Parsonage.

Where a Vicarage may be enlarged, and how.
Ibid. h. 2.

And if a Vicarage so fall into decay; that the same is not sufficient, competently to maintain a Vicar, the Bishop may judicially compel the Parson to enlarge the Vicarage or Appropriator; but by *Catisby*, 22 E. 4. 24. b.: such Augmentation must be made by the Bishop, Patron and Ordinary.

How a Vicarage may be dissolved.
Parry versus Bancks,
12 Jac. Scac.
Palmer 219.

It hath been Resolved, That where there is a Parsonage and Vicarage indowed, that the Bishop in the Vacation may dissolve the Vicarage: But if the Parsonage be impropriated, the Bishop cannot dissolve the Vicarage; for upon a dissolution the Cure must revert, which it cannot into Layhands: For where there is a Parsonage and Vicarage, they both have the Cure; the Parson *habitualiter*, the Vicar *actualiter*; *per Noy*.

How the Rectory and Vicarage may be reunited.

44 Aff p. 37.
2 H. 6. 33.
11 H. 6. 18. b.

If an Impropriator or Appropriator, Patron of a Vicarage, by agreement between him and the Ordinary, presents to the Parsonage, by this they are Re-united; and it seems that a bare Presentation, without any Agreement at all, disappropriates the Parsonage, and re-unites the Vicarage.

If

If any Charge fall upon the Vicarage, it ought to be repair'd by the Parson.

Charge falls on the Vicar, Parson is to free it.

And so much of Parsonages and Vicarages.

31 H.6.14.2.

A Donative is a Spiritual Preferment in the Church, Chappel or Vicarage, which is in the free Gift or Collation of the Patron, without making any Presentation to the Bishop.

A Donative, quid. More 765. Cro. Jac 63. Yelv. 50.

Neither needeth such Clergy-man have any Admission, Institution or Induction, by any Mandate from the Bishop, or others; but may by the Patron, or by any other authorized by the Patron, be put into possession.

1 Inst. 334.2.

And such Incumbent is free from the Visitation of the Bishop, or any other than his Patron or his Commissioners, and by consequence free'd from Procurations.

* And if the Bishop should take upon him to visit a Donative, and deprive the Incumbent, he runs himself into the danger of a *Premunire*. Co. 3 Inst. 122. & Davis Rep. 44. a. Ex Bro. *Prem.* 21.

* Ass. p. 29. *A Parish Church may be a Donative.*

And note, That a Parish Church may be a Donative, and have Cure of Souls: And such Donatives cannot lapse, unless by special Agreement at the Foundation; but the Ordinary may compel the Patron to collate.

2 Rolls R. 1. 1 Inst. 344. a. 6 H. 7. 14. 2. contra *Kebble*.

* But the Patron cannot collate a Lay-man, as some have thought, but a Spiritual Person in Holy Orders.

* Yelv. 61. F. N. B. 35. c. f. 1 Inst. 344. 2.

Cro. Jac. 63.
How a Donative may be made Presentative.

1 Inst. 344. a.
F.N.B. 35. c.

1 Inst. 344. a.

But if the Patron once present to a Donative, and the Clerk upon such Presentation be admitted, instituted and inducted, it is thereby for ever after become Presentative, and shall be no longer esteemed, or used, as a Donative.

But if a Stranger that has no Right, presents to a Donative, though his Clerk be admitted, instituted and inducted; yet that shall not alter the Nature of the Living.

The King may Found a Donative, or License a Subject to do it.

1 Inst. 344. a.

If the King found a Church, and exempt it from the Visitation of the Ordinary, it is a Donative, and the King shall visit by his Chancellor.

So it is, if the King found a Church or Chappel, without any special words.

Ibid.

And the King may give License to a Subject, to erect or found a Church or Chappel Donative, and exempt it from the Ordinaries Visitation; and the Patron may in such case Visit by his own Commissioners:

A Quare Imp. lies of a Donative.

1 Inst. 344. a.
Yelverton 61.
F.N.B. 35. c. f.

And a *Quare Impedit* may be brought of a Donative, *quod permittat ipsum presentare ad Ecclesiam*; but the Declaration in such case must be special.

Donatives within the Statute of Simony and Pluralities.

And Donatives are within the Statute against Simony, and where they have Cure of Souls, they are likewise within the Statute against Pluralities.

There

There is another sort of Church-Livings *Sine Cura's*, that are commonly called *Sine Cura's*; these are such Parsonages as have Vicars indowed with Cure of Souls, as has been said: But these are not within the Statute of Pluralities, nor are these Livings said to be incompatible: For those Livings are only said to be incompatible that have Cure of Souls; and therefore I conceive there needs no Dispensation, or Faculty, for taking one of these *Sine Cura's*, though the party had another Living before with Cure of Souls: But herein the party is best to be advised by some Learned Canonists; but by the Statute there needs no Dispensations.

Livings incompatible.
Quære.

And so much for Parsonages, Vicarages, Donatives, and *Sine Cura's*: And for other Church-Preferments, I shall refer the Reader to Mr. *Hughes* Learned Treatise of the *Parsons Law*, they being above my Undertaking.

C H A P. XIV.

What Resignations and Permutations are, and in what manner they may be made, and other matters relating to them; and of Union and Consolidations.

Resignation,
quid.

A Resignation is, where a Parson, Vicar, or other beneficed Clergy-man, voluntarily gives up, and surrenders his Charge and Preferment to those from whom he received the same, which may be absolutely, or upon condition.

To whom,
Dyer 294.b.

A Resignation must regularly be made to the next immediate Ordinary, and not to the Superior.

To or by a
Proctor.
Noy 147.

A Resignation may be made by or to a Proctor; but a Church is not void by any such Resignation in absence, till the same be presented, and accepted by the Ordinary: Or a Resignation may be made in the presence of a publick Notary in the absence of the Bishop; and after it is presented and accepted, it is as good as though the Bishop had been present.

Gaytons Case,
P. 34. El. C. B.

And

And though regularly Resignations ought to be made to the Bishop, from whom the Clerk, upon his Admission, receives his Charge and Cure; yet a Resignation to the King, as Supreme Ordinary, hath been held good.

Resignation may be to the King.
Dy. 294. p. 56.
Kelway 49.
Plo. 498. a.

The usual words of a Resignation are, *Renuntiare, Cedere, Remittere, & Resignare.*

Words of Resignation.
Dyer ibid.

Donatives must be resigned to the Patron, and not to the Ordinary; for the Clerk in that Case received his Living immediately from the Patron.

To whom a Donative is to be resigned.
Cro. Jac. 63.
Yelv. 60.
1 Inst. 344. a.

And if there be two Patrons of a Donative, and the Incumbent resign to one of them, it is good for the whole.

In the Case of one *Gayton*, P. 34 Eliz. in the Common Pleas, in a *Quare Impedit* for the Church of *Little Cressingham* in Norfolk, a Parson resigned his Benefice in the presence of a publick Notary, *sponte, pure, & simpliciter*, to the use of two upon Condition, *quod si aliqui eorum non admissi fuer' & realem possessionem Ecclesie prædictæ adipisci non valeant infra sex menses, quod tunc, &c.*

Cro. Jac. 63.
Yelv. 60.
Resignation in presence of a publick Notary.
Semble resolution.
P. 3. Eliz. rot.
343. C. B.

And in this Case it was very much disputed, whether a Resignation could be Condition; but at last, with advisement with the Civilians, it was Resolved, That a Resignation might be upon Condition.

Permu-

Permutations,
quid.

Regist. 306.b.

Permutations, or Exchanges, are where two Clergy-men agree to exchange their Livings, and after they made such Agreement and put in Writing, they make mutual Resignations upon Condition, in the Form following.

A Resignation upon Permutation.

Regist. Indit. 306.

In Dei nomine, Amen. Ego H. de W. Rector Ecclesie de N. Lincoln' Dioces. volens ipsam Ecclesiam meam cum Ecclesia de P. dictae Dioces. cujus Rector existit Dominus de W. certis justis, & legitimis de causis sine dolo & fraude Canonice permutare, ipsam Ecclesiam meam ex causa permutationis hujusmodi & non alio modo, in sacras manus venerabilis in Christo Patris Domini T. Dei gratia Lincoln' Episcopi resigno, supplicans humiliter & devote, ut H. de hujusmodi causa permutationis ipsam resignationem sic factam & non aliter velit admittere, & negotium permutationis hujusmodi quatenus ad vos attinet fideliter expedire. Et protestor expresse

preſſe in his ſcriptis, quod ſi dicta permutatio debitum non ſortiatur, effectum, quod huiusmodi mea reſignatio prædicta pro nullo penitus habeatur.

To which is added an Inſtrument containing a Proteſtation, in the Form following :

In Dei nomine, Amen. Ego H. <sup>The Prote-
ſtation.</sup> de W. nunc Rector Eccleſiæ de P. Lincoln' Dioceſ. & prius Rector Eccleſiæ de N. dictæ Dioceſ. proteſtor, dico & allego in his ſcriptis, quod ſi contingat quod huiusmodi Eccleſia mea de P. abſque dolo & culpa meis in hac parte à me aliquali-
ter evincatur, volo & intendo ad dictam Eccleſiam de N. abſque aliqua difficultate libere & licite redire, & eam re-habere juxta Canonicas ſanctiones, & proteſtor inſuper quod non intendo nec volo ab huiusmodi proteſtatione ſeu effectu ejusdem recedere ali-

aliquahter in futuro ; sed eidem protestationi & contentis in eadem, volo & intendo in futuris temporibus firmiter adherere, juris beneficio in omnibus semper salvo, &c.

What the effect of this Protestation is, I must leave to the Civilians to determine. However the intent of the thing agrees well enough with the reason of the Common Law; for, at the Common Law, if a man exchange Lands, and the Land he receives in exchange be evicted, he may repair to his own Lands, and re-enter upon them.

13 E. 4. 3. b.
Co. 4. 102. b.

Permutation
void, quia one
died before
Induction.
45 E. 3. F.
Exchange 10.
Co. 2 74. b.
Perkins tit.
Exchange.

And it has been Resolved, That where two Parsons of two several Churches, by an Instrument in Writing, agreed to permute their Churches by way of exchange, and severally resigned them into the hands of the Ordinary to that intent; and the several Patrons presented, according to the intent of the Exchange, and the one Parson was admitted, instituted and inducted; and the other was admitted and instituted, but died before induction; that though the induction of the other was absolute, yet this was so directed by the precedent Agreement, which was by way of Exchange, which ought to be executed on both parts in the life of the parties; and the induction could not be made upon Condition; therefore

fore for this reason it was all Resolved to be void.

A Union or Consolidation is where two or more Churches are united and consolidated into one, and may be for a certain time; as for the life of the Incumbent; and then it is but in the nature of a Plurality, or it may be perpetual.

Unions are made by the Ordinary by the consent of the Patrons in the Vacancy, with the Licence or Confirmation of the King: But if the Churches, or either of them, be full, the consent of the Incumbent is likewise necessary.

By a Statute made in the 37th year of Henry the Eighth, the Bishop is enabled to unite Churches which are within a mile one of the other, without the King's Licence or Confirmation, so as one of the Churches be not above Six pounds in the King's Book.

By another Statute in the 17th year of King Charles the Second, the Ordinary is enabled in Cities and Corporations to unite Churches, with the consent of the Chief Magistrates, without the King's Licence or Confirmation, so the Churches united exceed not 100 l. per Annum.

The uniting of Churches ought to be *causa utilitatis sive necessitatis*, as vicinity, paucity of Inhabitants, smallness of the Livings, &c.

And if two or more Churches shall be united upon a false Suggestion, it seems the Union is void, both by the Common and Canon Law.

Inst. Juris Canonici, 74.

Cro. El. 500, 501.

Finch 90, 91.

More 661.

50 E 3, 28. a.

27.

2 Rolls 778.

40 E 3, 28. a.

Causa 2, 16. q.

Et Tempori 1.

See Dyer 259.

p. 19. bone forme du Union.

Stat. 37 H. 8.

cap. 21.

12 Car. 2. c. 3.

Cro. El. 501.

Cro. El. 501.

2 Rolls 778.

As:

At the Common Law, it should seem, Churches might be united of any value by the Ordinary, with the consent of the Patron's and the King's Licence or Confirmation.

Cro. Eliz. 501.
per Gaudy &
Fenner.
Finch 91.

But I find two Judges affirm, That the Ordinary might unite poor Livings without the King's Licence or Consent; but not great ones.

50 E. 3. 27. a.
11 H. 7. 82. b.
92. a.
F. Grant. 104.

Whence the Judges took this difference I am to seek: For in the height of Popery I find the King's Licence or Confirmation always concurrent.

And so much for Unions and Consolidations.

Attorney General *versus* Episc. Oxon. about 12 Car. 1. Bill to unite a Parsonage to the Bishop's See. *Totbil's* Transactions in Chancery, 133.

Gloria Deo Omnipotenti.

The End of the First Part.

BOOK II.

THE

LAW

OF

TYTHES,

OR,

TYTHING.

BOOK

W A

Y I H E S

EXHIBIT

In

W

W

Prin

I

B

THE
Second Part :
BEING THE
L A W
OF
TYTHES or TYTHING.

SHEWING

In what manner all manner of Tythes,
Offerings, Mortuaries, and all other
Church Duties are to be paid, and in
what Courts and manner they may be
recovered, and to what Charges they
are subject.

*With many other things fit for all People,
but especially Clergy-Men, to know.*

Written by Sir SYMON DEGGE, Kt.

L O N D O N,

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Esquires. for R. Sare and D. Brown, J. Nickolson,
B. Fook and G. Strahan. 1703.

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To his Worthy and Reverend Son in Law, Mr. *Anthony Trollop*, Rector of *Norbury* in *Derbyshire*.

Dear Son,

I *T* is now above thirty years, since the *Tything Table*, published many years ago, came to my Hand; and upon perusal thereof finding that the Common Laws and Canon Laws differed in many things, I thought it would be a Work grateful to the Clergy, and useful to others, to publish something in order to the reconciling of them: To which end I had gathered together some Materials; but the War coming immediately on, and after that the Ecclesiastical

The Epistle Dedicatory.

Courts being laid aside, and other Courses found out for the recovery of Tythes, I desisted the father Prosecution of that Design, until it was revived at your request, seconded by some other Reverend Divines; whereupon, looking up my old Notes, and adding such Judgments and Resolutions, that I have since come to the knowledge of, the whole is reduced to the form I here present it to you. You have most Right to it, and I heartily wish it may be of as great Service and Advantage to you, and all the Reverend Clergy, as is desired by him that is

Your affectionate

loving Father

S. D.

THE

THE
LAW
OF
TYTHES or TYTHING.

CHAP. I.

What Tythes are, the several sorts and kinds thereof, and in what manner due.

HAVING in the former part of this Discourse shewed the Worthy and Reverend Clergy-Men in what manner they may lawfully and justifiably attain to such Preferments in the Church as they are capable of, and in what manner they may avoid all the perils and dangers that attend the Beneficed Clergy-Men: It rests now that I shew them what Profits they may justly challenge to belong to their Church Preferments, and in what manner to be

P 3

paid,

paid, and how to be recovered, if need require. And first of Tythes, which the Canonists define Tithes to be,

Definition.

A tenth part or portion of Increase, commanded to be paid to the Sons of Levi for their Ministry, wherein they served in the Tabernacle.

Or, as some others define them they are,
Omnium bonorum licite quæstorum quota pars Dea Divina institutione debita.

But the Common Lawyers define them to be,

Co. II. 13. b.

An Ecclesiastical Inheritance Collateral to the Estate of the Land, and of their own proper Nature due only to an Ecclesiastical Person, by the Ecclesiastical Laws.

4 Leon. 47.

And for that reason no unity of Possession can extinct or suspend them; but they, notwithstanding such unity remain *in esse*, and may be demised or granted, notwithstanding such unity: But may more properly in my judgment, be defined to be,

A tenth part, or some other thing in lieu thereof, of all the increase yearly arising forth of the profits of the Lands and Stocks, or raised by the Industry of the Parishioner, and properly due to the Clergy that have the Cure of the Souls in the Parish where they arise.

Division.

And by some Canonists Tythes have been divided only into two kinds, that is, Predial and Personal: And in this manner of division they comprehend all manner of Tythes that arise either immediately or mediately from the Land, under the name of Predial Tythes; which they again distinguish into predial, mediate and immediate; under which they comprehend the Tythes

*Doct. & Stud.
l. 2. c. 55. p.
168. b.*

Tythes of Corn, Hay, Wood, Herbs, and all other things that either come from the ground by Manurance, or of its own nature; and under the name of Tythes Predial mediate, is comprehended the Tythes of all manner of Cattel and other things that receive their nourishment from the Ground.

Linwood c.
*Quoniam propter
verbis divi-
dend. est deci-
ma.*

But Tythes by the Common Lawyers (and which division I shall observe in my Discourse) are divided into Predial, Mixt and Personal: and according to this division all Tythes that arise from the Ground, as before is said, immediately, are only accounted to be Predial: And those that arise from Cattel and other things, that receive their nourishment immediately from the Ground, they call Mixt; and those that arise from the Labour and Industry of Man alone, Personal.

Linwood c.
*Quoniam propter
verbis tali-
bus decimis.*

Tythes again both by the Common Lawyers and Canonists are divided into great Tythes, in Latin *maiores, seu grossæ decimæ*; and into small Tythes in Latin *minores, or minutæ decimæ*. And in this division Corn, Hay and Wood are all accounted gross or great Tythes. But there has been some question, whether Tythe Wood should be accounted a great or minute Tythe; and resolved that if a Vicar be only endowed with the small Tythes, and have by reason thereof always had Tythe Wood, that in such case it shall be accounted a small Tythe, otherways it is to be accounted amongst the great Tythes. And Woods has been twice adjudged to

Rolls 1, 643.
v. 2.

2 Bulst. 27.

Littl. Rep. 244.

be a small Tythe, as *Littleton Reports*.

Cro. El. 467.
Hutton 77.
Cro. Car. 28.
Rolls 1. 643.
v. 3.

But all manner of Tythes of Gardens, Herbs, Roots, Fruit, Saffron, Woad, whether sowed in Fields or Gardens, Flax, Hemp, Hops, Rape, and all other Predial Personal and mixt Tythes are accounted *inter minutas decimas*; but in *Udal's* and *Tindal's Case*, *Hutton* 77. in some cases Hops, Woad, &c. may be great Tythes in places where they are much sowed.

Palmer 219.
220.

Lindwood c.
Quoniam propter
verb. talibus
decimis.

And herein the custom of *England* is kind to the poor Vicars, making many things to be allowed for minute Tythes that are not so in others.

Spelm. Gloss.
28. *Cio El.* 578
Hetly 135.
Winch. 70.
Quo jure debet.

I have been the longer in this division of Tythes, betwen great Tythes and small Tythes, because many Vicarages are endowed with the small Tythes only; and in some old endowments you will find the word *Altaragium*, which by custom may as well comprehend the small Tythes, as such Profits as arise from the Altar.

Heylins hist. of
Presbytery 39.
Seld. Hist. de
cim. c. 5. Sect.
4. c. 7.

Now perhaps it may be expected I should say something to satisfie the Reader by what Law Tythes became due under the Gospel. But in that point I find so great a difference between the Canonists, School Men and Divines, that it would be a great presumption in me to take upon me to determine the point; the rather because I am informed by a reverend, learned and grave Divine, that the Learned *Selden* retracted his Opinion therein; and what it was you may see in the places noted in the Margent.

This Retraction of *Seldens* is also published

lished in Dr. Comber's Preface, to the first part of his History of Tythes. But Mr. Wood (*Athenæ Oxon* part 3. f. 108.) says he was forced to do it. Which seems plain by these two passages of Mr. Selden.

Cum Richardus Montacutius (postea Episcopus Norwicensis) in se recepisset Historiæ Decimarum, rege annuente, confutationem, Rex mihi acrius interdicens Responso aliquo, mihi dixit, si aut tu ipse aut quis amicorum in Confutationem illam (quæ paulo post furore plenissimo Anglice exiit) Scripseritis, in vincula te conjiciam. Quod Confutationis futura, puto, non exigua per se Confutationis instar fuit. Vindiciæ de Scriptione Maris Claus. 19.

Sed adjiciendi plura de homine (speaking of Dr. Montague) locus hic non est; uti nec plura aperiendi de lite illa Decimarum acriter nimis, non dico quam feliciter, a compluribus contra nos, manam interea de tabula, non sine jussu Principali, cui libentissime parebamus, secure retinentes disputata. Numerosus sane est libellorum, quos ea occupat, cumulus; sed diu est quod annosa satis, & satis vexata, prudenter, puto, sopita est. De Dis syris (Edit. Amstel.) p. 285, 286.

But so far as I have observed, they all agree in this, That Tythes *quoad sustentationem Cleri vel Ministrorum Dei* are *Jure Divino*: So that the sole question amongst all these Learned Men is about the quantity, or *quota pars*. But be they due *jure Divino, jure Ecclesiastico, or jure Humano*, I conceive the difference cannot be great, since, as it must necessarily be confessed, they have been given and consecrated *Deo*

And in the end of the Epistle to the Reader. The Question.

Doct. & Stud.
l. 2. c. 55. f.
164. b. 165.
4.

& *Sanctæ Ecclesiæ*; and so being dedicated to God and his Service (in my poor judgment) the taking them away from the proper use and end, cannot be less Sacrilegious, than if they were without dispute *Jure Divino*. I shall not therefore stuff this present Discourse with the Arguments of any side, but shall leave the Learned to their own conceits, it serving my purpose that they be due by any Law, Divine, Humane or Ecclesiastical. My next Examination shall be to whom they are due.

CHAP. II.

To whom Tythes are due, and by whom to be paid.

HAVING shewed in the former Chapter what Tythes are, and the several kinds thereof, I shall in the next place shew to whom the same are due.

To whom Tythes are due to be paid.

Selden's Hist.
decim. 178, &c.
Tho. Aq. Sum.
20. 2^a. q. 88.
art. 3. conclusions.

That there were Infeudations of Tythes before the Parochial Rights were settled, is without dispute both here in *England*, and in other Christian Kingdoms and Commonwealths: In which particular the curious may satisfy themselves in Mr. *Selden's History of Tythes*, and other Authors. And it is more clear, that before the time that the Parochial Right of Tythes were settled, that the Owners of Lands might grant their Tythes to Ecclesiastical or Religious Persons (a multitude of Presidents where-

whereof the Reader for his satisfaction may find in the *Monasticon Anglicanum* of Mr. Dugdale :) so that by this means the whole Tythes of some Parishes, and divers great Portions out of other Parishes, were granted to Abbots, Priors, &c. And some to the Parsons and Rectors of other Parishes ; which is the reason why at this day there are several Portions of Tythes held from the Parish Churches by Improprator and Rectors of other Parish Churches.

When the Parochial Right of Tythes was first settled, there hath been (as should seem) a vulgar Error . For 'tis frequently said in our Common Law Books, that before the General Council of *Lateran*, which was held 1179. that every one was at liberty to give his Tythes to what Spiritual, Ecclesiastical or Religious person he pleased ; but that by that Council the Parochial Right of them was settled. Neither was this an Error of the Common Lawyers only, for Mr. *Lindwood* a Learned Doctor of the Civil and Canon Laws, that lived in the time of H. 5. about two hundred and fifty years ago, tells us, that

Bene potuerunt Laici decimas in feudum retinere, & eas alteri Ecclesie dare ante Concilium Lateranense, non tamen post, &c.

But there is no Canon in that Council to be found, whereby the Parochial Right of Tythes was settled, nor was the Parochial Right of Tythes settled till the year 1200. and then not by any Canon, but by a decretal Epistle of Pope *Innocent* the third, a Brief of which Epistle here follows, as I find

When the Parochial Right of Tythes first began.

10 H. 7. 8.a.
43 E. 3. 5.
Doct. & Stud.
1. 2. c. 55.
Co. 2. 44. b.
Dyer 84, &c.

Linwood c. locat. & conduct. verb. portion.

*Seldens Hist. decim. 231.
2 Inst. 641.
Selden de Dec. 289. 488.*

Innocent 3.
Ep. Decret. l. 1.
2. p. 452. Edit.
Colen.
Seldens Hist.
of Tythes, 231.

find it in Mr. Selden's *History of Tythes*, and in Sir *Edward Cook's Institutes*.

Innocent 3.
tells us in his
Epistles, that
Tythes are due
to the Parish
Priest de com-
muni jure.
Vid. Decretal.
Greg. l. 3. de
decimis c. 30.
Cum in tua
Diocesi & ibid.
c. 29. Cum
contingat.

Pervenit ad audientiam nostram, quod multi in Diocesi tua Decimas suas integras vel duas partes ipsarum non illis Ecclesiis, in quarum Parochiis habitant, vel ubi prædia habent, & a quibus Ecclesiastica percipiunt Sacramenta, persolvunt; sed eas aliis pro sua distribuunt voluntate: Cum igitur inconveniens esse videatur & a ratione dissimile, ut Ecclesiæ, quæ Spiritualia seminant, metere non debeant a suis Parochianis temporalia, & habere, Fraternitati tuæ (being directed to the Archbishop of Canterbury) auctoritate præsentium indulgemus, ut liceat tibi super hoc, non obstante contradictione vel appellatione cujuslibet seu consuetudine hætenus observata, quod canonicum fuerit ordinare, & facere quod statueris per Censuram Ecclesiasticam firmiter observari: Nulli ergo, &c. Confirmationis, &c. Datum Lateran. 2 Nonas Julii.

I must acknowledge I give the Reader this a little imperfect for want of the Original; and it was Sir *Edward Coke's* Case also; for I perceive he borrowed his from Mr. *Selden*.

But some have fancied (and perhaps not without reason; for this seems not to be a general Decree, but a particular Instruction to the Archbishop of Canterbury) that the Parochial Right of Tythes was not generally settled of long after, that is, by a Canon made in the Council of *Lyons*, which was in the year of our Lord 1274. under Gregory the Tenth, in which Council, it is said, there is a Canon for the

Vide Selden's
Hist. of Tythes,
147.

the settling the Parochial Right of Tythes, but not found among the Canons of that Council. But whether that were the Original, or a Confirmation of some other Decree or Council, I dare not take upon me to judge; But certain it is, that about this Century the Parochial Right of Tythes was settled in general. But though this decretal Epistle of Pope *Innocent* the Third be not general, yet it was Obligatory as to the Province of *Canterbury*; so that in that Province the Parochial Right of Tythes may take its date from the time of that decretal Epistle, which was, as above is said, in the year 1200.

Godolph. Rep.
Can. 358.

Mr. Doctor *Godolphin* in his *Repertitorium Canonum* seems not satisfied, that it is a vulgar Error in our Books, that before the Council of *Lateran*, every one was at liberty to give his Tythes to what Spiritual or Religious person he pleased; and to prove a settlement of a Parochial Right of Tythes by a Council of *Lateran*, he cites a Canon made by *Innocent* the Third in the second Council of *Lateran* held in the year of our Lord 1120. sixty years before the Council held under *Alexander* the Third, 1179. or as some have it 1180. Linwood 81. where he says it was decreed that the Religious persons, viz. the *Cisterians*, *Hospitalers*, *Templers*, and those of *St. John* of *Jerusalem*, which by the Popes *Paschal* and *Adrian* were exempted from payment of Tythes, should pay the same to the Parochial Incumbent, whereby a Parochial Right of Tythes was settled by a *Lateran* Council, as he concludes. But

Page 358.

b. Selden DeDec.
137.

Page 616.

But I wonder the Doctor should mistake himself so much ; for first, there was no *Lateran*, Council in the year 1120. and he himself in his Catalogue of the Councils mentions none to be held that year, but assigns the second *Lateran* Council to be held in the year 1131. wherein the Doctor is again mistaken ; for the second *Lateran* Council that is not reckon'd amongst the General Councils, was held under *Paschal* the Second 1112. And the second General Council held in the *Lateran*, was held under *Innocent* the Second, *Anno* 1139. but of neither of these Councils are any Acts to be produced ; besides, Pope *Innocent* the Third entred not upon the Papacy till 1199. and so could hold no Council 1120.

Decret. Greg.
l. 3. tit. 30.
cap. 34.

But I presume the Doctor meant the Council of *Lateran* held under *Innocent* the Third, 1215. where there is a Canon something like that the Doctor mentions ; for by that Council it is decreed, That the *Cisterians*, and all other Orders priviledged from the Payment of Tythes (without enumerating any more of the Orders) should pay Tythes of such Lands as they should purchase after that Council, although they held them in ther own proper hands ; *Ecclesiis quibus ratione prædiorum antea solvebantur, nisi cum ipsis Ecclesiis aliter duxerint componendum* : But this can settle no Parochial Right, for it is only that the Tythes shall be paid to the Churches, *quibus antea solvebantur*. And that the Parochial Right of Tythes was settled before that Council,

cil, appears clearly by the very next Canon of that Council; For there being Complaints made in that Council that divers Clerks, as well Regular as Secular, upon Grants and Leases of their Lands, took Covenants of their Grantees and Tenants to pay their Tythes to the Grantors in prejudice of the Parish Priests, it was therefore decreed, *quod quicquid fuerit occasione hujusmodi pacti præceptum Ecclesiæ parochiali reddatur*; this word *reddatur* proves sufficiently that the Parochial Right was settled before that time; and Pope *Innocent* the Third, in several of his Epistles, declares that they are due to the Parish Priests *de communi jure*.

Selden DeDec.
137.
Can. 55.

And that the Parochial Right of Tythes was not settled by any General Council, but by a Papal Constitution, appears clearly by what Sir *Robert Parning* says, who lived within an hundred years of this time, and was after Chief Justice the of Common-Pleas, who could not be ignorant how the Parochial Right of Tythes was settled; and he says, That in ancient time before a new Constitution made by the Pope, the Patron of a Church might grant Tythes within his Parish to another Parish.

Greg. Decret.
l. 3. de decim.
c. 30. Cum tua
Dioces. & ibid.
c. 19. cum con-
tingat.

Selden de Dec.
294.

7 E. 3. 5. a.

Nota.

But whether the Parochial Right of Tythes was settled the one way or the other, it seems that all former Grants were nullified, or otherwise the Constitution had wrought small effect to the end it was designed, the greatest part of the Tythes being before that time granted to Monasteries,

ries, as may be observed in the *Monasticum Anglicanum*.

But notwithstanding this Constitution, many of the Abbots held out against the Parish Priests, who durst not, or were not able to contest them, and after claimed the Tythes by Prescription, that is to say, by forty years possession, which is a Prescription allowed by the Ecclesiastical Courts; and that's the reason that many Portions of Tythes are at this day held by Impropiators that had been gained by the Abbots by such Prescriptions, and not by their ancient Grants, and by this means they got their Prescription *de non decimando*: For the Canon Law does allow one Clergy-Man to prescribe against another, but not a Lay-Man by any means to the prejudice of the Church. But if a Clergy-Man, Secular or Regular, continue to have the possession of a portion of Tythes in another Parish quietly forty years, this shall make him a good Title against the proper Incumbent, and the same Law holds *de non decimando*: For if a Clergy-Man Religious, Secular or Regular, hold any Land forty years together Tythe free, he shall hold Tythe free for ever; but if a Lay-man hold Lands Tythe free a thousand years, it avails him nothing by that Law.

But after the Parochial Right of Tythes was settled, it is clear, that no Lay-man was capable of Tythes in pernanacy, but in particular Cases, till the Statutes by which the Monasteries and Religious Houses were dissolved, enabled them: But in some

Seld. de Dec.
161.

Greg. Decret.
l. 2. tit. 26.
c. 6. ad aures
nostras.

Ibid. c. 7. cau-
sam quæ, &c.

Seldens Hist.
decim. 398.
and in his Re-
view 478.

some special Cases Lay-men were capable of Tythes in pernanacy, as in the Case of *Pigor* and *Heron* cited in the Bishop of *Winchester's* Case, where the Case is put, That the Lord of a Manor, and all those whose Estate he had in the Manor time out of mind, had paid to the Parson of *D.* (in which Parish the Manor lay) for the time being, a certain Sum for the maintenance of Divine Service in contentation of all Tythes arising within the said Manor, and that in consideration thereof he, and all those whose Estates he had in the said Manor by the time aforesaid, had and enjoyed all the Tythes arising in the said Manor: And in this case it was adjudged, That the Lord of the Manor might have these Tythes in pernanacy, and sue for the same in the *Spiritual Court*; but a Man cannot claim Tythes generally as part of, or belonging to a Manor.

Co. 2. 44. a.
Lay-men capable of Tythes in Pernanacy.
Co. 2. 45. a.

More 599.

But since the several Statutes made for the dissolution of Monasteries, those Tythes which were appropriated to the Religious Houses so dissolved are become Lay-Fee, and any Lay-Men by the Laws of this Realm are capable of them in pernanacy, and may sue for the same in the *Spiritual Courts*.

Lay-men capable of Tythes in Pernanacy by the Statutes of the Dissolution of Abbeys.

But since the Parochial Right of Tythes was settled *prima facie*, all Tythes not appropriated belong to the Rector of the Parish-Church wherein they arise; yet notwithstanding the Parson of one Parish may prescribe to have a Portion of Tythes in the Parish of another; and so might Abbots, Priors, and other Religious Persons

All the Tythes belonging to the Rector *prima facie*. Portions by Prescription. Greg. Decr. prescrip. 14 H. 4. 17. 2. 44. Ass. p. 25. Rolls 1. 657.0.

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pre-

Selden's Hist.
of Tythes, 161.
How Prescriptions
are to be
proved.

Selden's Hist.
decim. 364.
209.

Selden 399.

Extra-parochial
Tythes. 7 E. 3.

Selden's Hist.
decim. 108.

21 Aff. 75.

2 Inst. 647.

Rolls 1. 657.

o.

10 H. 7. 18. a.

Co. 5. part 128.

prescribe to have Portions of Tythes in Parishes whereof they had not the Advowsons, and by consequence the Patentees from the Crown, and the Impropriators may claim the same by Prescriptions in the Abbots, Priors, &c. and the usage since the dissolution will serve to prove the prescription and usage in the Abbots, &c. that they held the same so time out of mind. But no Layman at this day is capable of Tythes in pernanacy but under the Statutes of Dissolution, unless by a Grant by the Bishop, Parson and Patron made before the disabling Statues.

As for Extra-Parochial Tythes, there have been some differing Opinions. Sir William Herle was of Opinion, that they belonged to the Bishop of the Diocess, as general Parson of his whole Diocess, grounding his Opinion, as it should seem, upon the Canon Law; but there was never any such Canon received or approved in this Kingdom.

Mr. Selden is of Opinion, that Tythes of Increase of Lands not limited to any Parish may be disposed of arbitrarily in like manner as other Tythes might before the Parochial Right of Payment was established. *Selden de Decimis, 365.*

But it hath been resolved both in Parliament and by several Judgments at Common Law, that all Extra-Parochial Tythes belong to the King, who is a mixt Person, and capable of Tythes at the Common Law in pernanacy.

Now having shewed in general who are capable of Tythes in pernanacy at this day, and

and to whom of common Right they belong, I shall proceed to shew to whom they are due in some particular Cases.

If a Parson Lease his Glebe-Lands, and do not also grant the Tythes thereof, the Tenant shall pay the Parson Tythes, Nay though the Parson Lease his Lands *cum omnibus proficuis & commoditatibus eidem spectantibus*, rendring Rent, *pro omnibus exactionibus & demandis quibuscunque*; yet notwithstanding the Tenant shall pay the Parson the Tythes arising upon these Lands.

The like Law it is, if an Impropiator, Vicar, &c. make such Lease, &c.

And as the Parson shall have Tythe of his own Tenant, so he shall have of his Feoffee: And if a Parson hath Lands in the same Parish whereof he is Parson, and demises his Tythes, he shall pay Tythes to his Farmer.

If a Parson sow his Ground, and then sell the Emblements (I mean the Corn growing upon the Ground) the buyer of the Corn shall pay the Tythe of it to the Parson that sowed and sold the Corn.

So if a Parson sow his Glebe-Land, and then Lease the Land, the Tenant shall pay his Parson Landlord Tythe of this Corn.

There have been some Opinions, that if the Parishioner sow his Lands, and before severance the Parson die, that in this Case the Parsons Executors and not his Successor should have the Tythes. *Br. Embl. 2. cont.*

And there have been some Opinions, that if the Parson sow his Glebe and die before severance, that his Executors should

Ryley's Records 50.
In particular Cases to whom Tythes are due.
C. 6 El. 161.
Against the Parson's own Lease.
Owen 39.
Postman vers. Hind. M. 31. & 32 El. B. R.
Co. 11. 13. b.
Dyer 43. p. 22.
est Quare.
Herly 31.
Against his Feoffment.
Co. 1. 111. a.
C. 11. 13. b.
Cro. El. 261.
Dyer 43. p. 21.
Moyle versus Ewre.
Hill. 11. Jac. B. R.
Rolls 655 k. t.
C. 10. 88. b.
21 H. 30. a.
Uphaven vers. Humphries
40. El. per Poph. & Gawdy vers. Fenner.

Br. Embl. 9.
acc. 2. contra.
*To whom the
Tythes in the
Vacation be-
long.*

Stat. 28 H. 8.
c. 11.

Rolls 655. k.3.
C. L. 55. 6.
Cap. Nullus
Rector verb.
decefferint.

*Whether the Vi-
car and Parson
shall pay to each
other. More*

910. 457.

Crompton's
Case P. 7. Car.
1. B. R.

Hetly 135.

Cro. El. 578.

Winch. 70.

*Tythes may be
long to a Chap-
pel.*

More 457.

910.

Hetly 135.

Winch. 701.

13 Aff. p. 2.

Dyer 87.

Rast. Ent.

Tresp. in dis-
mes 4. & Præ-
munire in
Rome 4.

* Decret. Greg.
de decim. Cum
sunt Gloss. ver-
bo diversa.

17 Car. 2.

Cap. 3.

not pay Tythes of his Corn. *Br. Emble-
ments.*

But both these Cases, if they had been Law, are put out of doubt by the Statute of 28 H. 8. which hath given all the Tythes and other Profits belonging to the Rectory to the Successor, from the death of the last Incumbent, which hath taken away all pretence the Executors could have in such Cases. But notwithstanding this Statute, I take the Law to be clear that the Executor of the Parson shall have the Corn sown by his Testator in his life-time, as the Executors of other Tenants for Life have by the Law.

And so it is settled by the Statute of 28 H. 8. before mentioned: But if the Parson, Vicar, &c. sow the Land and be deprived, resign or accept another Living, the Successor shall have the Tythe.

It hath been held, that the Vicar upon a general Indowment shall not pay Tythes of his Glebe to the Parson, or the Fruits that arise from the same, *Quid decimas Ecclesia Ecclesiae reddere non debet*, without special Words.

So if a Vicar be indowed of all the small Tythes arising within the Parish, yet he shall not have the small Tythes arising upon the Glebe-Lands of the Parson.

Tythes by prescription may be appendant to an ancient Chappel.

* And note, That by the Canon Law, personal Tythes are to be paid where the Party communicates, but predial to the Parson within whose Parish the Land lies,

Lind.

Lindwood cap. Sancta Ecclesia. De decimis, in the Gloss verbo negotiationum.

By an Act of Parliament made in the seventeenth Year of the Reign of King Charles the II. It is Enacted, That every Owner or Proprietor, Owners or Proprietors of any Impropriation, Tythes or portions of Tythes in any Parish or Chapelry within the Kingdom of *England*, or Dominion of *Wales*, is, are or shall be by virtue of this Act inabled and impowred to give and bestow, unite and annex the same, or any part thereof, unto the Parsonage or Vicarage of the said Church or Chappel where the same do lie or arise, or settle the same in Trust for the benefit of the same Parsonage or Vicarage, or of the Curate or Curates there successively, where the Parsonage is Improprate, or no Vicar indowed, according to his or their respective Estates, without any Licence of Mortmain, any Law or Statute to the contrary notwithstanding.

A Law for the reuniting Improprations to Parish Churches

And it is farther Enacted by the same Act, That if the settled Maintainance of such Parsonages, Vicarages, Churches and Chappels so united, or of any Parsonage or Vicarage with Cure, in the Kingdom of *England* or Dominion of *Wales*, shall not amount to the full Sum of one hundred pounds *per annum*, clear and above reprises, that then it shall and may be lawful for the Parson, Vicar or Incumbent of the same and his Successors, to take, receive and purchase to him and his Successors, Lands, Tenements, Rents, Tythes or other Hereditaments, without any Licence of Mortmain,

main, any Law or Statute to the contrary notwithstanding.

29 Car. 2. cap.
*An Act for the
confirming and
continuance of
Augmentations.*

This is an excellent Law, which I hope may turn very much to the benefit of the Church, and there is another beneficial Law for the Church, made in the 29th Year of the Reign of the late King Charles the Second, that relates, Whereas divers Arch-Bishops, Bishops, Deans and Chapters, and other Ecclesiastical Persons, in obedience to his Majesty's Letters, bearing date the first of June in the twelfth Year of his Majesty's Reign, and out of a pious care to improve poor Vicarages and Curacies, where the Indowments thereof were found too small to afford a competent Maintenance to those that serve the Cure, have, since his Majesty's happy return upon the renewing of Leases of Rectories of Tythes impropriate or appropriate, made or may hereafter make divers reservations beyond the ancient Rent, to the intent the same should or might become payable to the said Vicars or Curates, in augmentation of their Indowments, which have been for the most part enjoyed accordingly.

But in regard such reservations were not made to the Vicars or Curates, or if they were, no convenient remedy could be had by such Vicars or Curates, for the recovery thereof, and they were not at the time thereof capable of taking any to their own use, whereupon the provision will depend upon the good pleasure of the Successor, and may in time be disappointed. For establishing whereof, it is Enacted, That all
and

and every Augmentation of what nature soever, granted, reserved or agreed to be made payable since the first day of *June* in the twelfth Year of his said Majesty's Reign, which shall at any time hereafter be granted, reserved or made payable to any Vicar or Curate, or reserved by way of increase of Rent to the Lessor, but intended to be to and for the use or behoof of any Vicar or Curate, or by any Arch-Bishop, Bishop, Dean, Provost, Dean and Chapter, Arch-Deacon, Prebendary, or other Ecclesiastical Corporation, Person or Persons whatsoever, so making the said reservation, out of any Rectory Improprite or portion of Tythes belonging to any Arch-Bishop, Bishop, Dean, Provost, Dean and Chapter, or other Ecclesiastical Corporation, Person or Persons, shall be deemed and adjudged to continue and remain, as well during the continuance of the Estate or Term upon which the said Augmentations were granted, reserved or agreed to be made payable, as afterwards in whose hands soever the said Rectory or portion of Tythes shall be chargable therewith, whether the same be reserved again or not. And the said Vicars and Curates respectively are hereby adjudged to be in the actual possession thereof, for the use of themselves and their Successors, and the same shall for ever hereafter be taken, received and enjoyed by the said Vicars and Curates, and their Successors, as well during the continuance of the Term and Estate on which the said Augmentations were granted, reserved or agreed to be

made payable as afterwards: and the said Vicars and Curates shall have remedy for the same, either by Distress upon the Rectory Improprate, or portions of Tythes charged therewith, or by Action of Debt against that Person who ought to have payed the same, his Executors or Administrators, any disability in the Person or Persons, Bodies Politick or Corporate so granting, or any disability or incapacity in the Vicars or Curates to whom or for whose use or benefit the same were granted or intended to be granted, the Statute of Mortmain or any other Law, Custom, or other matter or thing whatsoever to the contrary notwithstanding.

None to be confirmed which exceed one Moiety of the Rectory, &c.

Provided always, That no future Augmentation be confirmed by virtue of this Act, which shall exceed one Moiety of the clear yearly Value, above all reprice of the Rectory improprate out of which the same shall be granted or reserved.

And to the end the said Vicars and Curates may the better make appear the certainty of the said Augmentations; Be it Enacted, &c. That every Arch-Bishop, Bishop, Dean and Chapter respectively, on or before the 29th day of September next coming, shall cause every Lease or Grant wherein any Augmentation is made, to be fairly entred into a Book of Parchment to be kept by their respective Registers for that purpose. And every Dean, Arch-Deacon, Prebendary or other Ecclesiastical Person respectively, shall cause every Lease or Grant whereupon such Augmentation hath been

been made, by himself, his Predecessor or Predecessors, to be entred in the said Book to be kept by the Register of the Bishop of the Diocess, for entring whereof no Fee shall be paid, nor any thing demanded, save only a reasonable Reward to the Clerk for the entring the same, not exceeding 5 s. which said Entry being examined by the respective Arch-Bishop, Bishop or Dean, and by them respectively attested in the same Book to be a true Copy of the Original Lease or Grant, and the Augmentation in the same was intended for such use, shall be as a Record, a true Copy whereof proved by Witnesses to be a true Copy, shall be deemed, taken, adjudged and expounded to be good and sufficient Evidence in the Law, wherein the said Vicars and Curates respectively shall and may by virtue of this Act from time to time recover the benefit of such Augmentation.

And be it farther Enacted, that where any Arch-Bishop, Bishop, Dean and Chapter, or any other Ecclesiastical Corporation or Person whatsoever, upon the renewing or granting any Lease or Estate, have made any Agreement for an Augmentation for the Vicar or Curate, and the said Augmentation hath for any time been accordingly paid, altho the said Agreement is not expressed or mentioned in the said Lease or Grant, every such Ecclesiastical Person shall cause the substance of such Agreement to be entred in the said Book, to remain for a Memorial of it to perpetuity.

Augmentations continued, though not expressed in any new Lease.

And it is farther Enacted, That such
Aug.

Augmentation so entred shall likewise continue and be for ever hereafter good and available in the Law, for the benefit of the Vicar or Curate for whom it was intended, and their Successors, as well against the Arch-Bishop, Bishop or Ecclesiastical Corporation or Person who agreed for the same, and his and their Successors, as against every other Person enjoying the said Rectories or Portions of Tythes intended to be charged therewith in the same manner, and for which they shall have the same remedy as they should or ought to have by virtue of this Act, as if the same had been mentioned and reserved in and by the Lease.

Such Reservations shall have favourable Constructions.

And relievable by Commissioners for charitable Uses.

Leases made, wherein the Augmentations shall not be mentioned, to be void.

Proviso for a Lease of the Parsonage of Sutton in Nottinghamshire.

And if any question shall hereafter arise concerning the validity of such Grants, or any other matter or thing in this Act mentioned and contained, such favourable constructions, and such farther remedy if need be, shall be had and made for the benefit of such Vicars and Curates as heretofore have been had and made, or may be had for other charitable Uses.

And it is farther Enacted, That if upon the surrender, expiration or other determination of any Lease wherein such Augmentation as aforesaid, hath or shall be granted, any new Lease of the Premises or any part thereof be made without express continuance of the said Augmentation, every such new Lease shall be utterly void to all intents and purposes.

There is a Proviso in this Act, That this Act should not invalidate a Lease made by the Dean and Chapter of York, bearing date

date the nineteenth day of October, 1676.
of the Parsonage of *Stourton* in the County
of *Nottingham*.

And another Proviso, That this Act shall not invalidate another Lease made by the Dean and Chapter of *Oxon* to one *Arthur Sprey*.
Another Proviso not to invalidate a Lease to Arthur Sprey.

C H A P. III.

Of what things Tythes are due, and in what manner Tythes of Hay and Corn are to be paid.

TYthes regularly are to be paid of all things annually arising from the Ground, either of themselves, or by the Culture and Industry of the Parishioner, without any deduction of charge in their proper kinds, as soon as the same may be separated and divided from the nine parts, in Sheaves, Garbs or Heaps. But the manner and form of the payment of Tythes is for the most part governed by the custom of the place: And therefore if by custom the tenth part of Corn or Hay hath been measured forth growing upon the Lands, as 'tis in some parts of *Lincolnshire*, this manner of Tything is to be observed; for in what manner soever the Tythe hath been paid time out of mind, in such manner it still ought to be paid; and therefore where Tythe Corn hath been paid time out of mind, in Sheaves or Garbs bound up, it is
Of what things Tythes are to be paid.
Co. II. 160. F. N. B. 53.E.
Linwood c. Quoniam propter verb. non deductis expensis.
How Tythes of Corn are to be paid.
Stat. 27 H.8.c. 20. 32 H.8.c.7. Latch. 125.
no

no good payment to leave it in Bonds unbound, as I have known some contentious Parishioners do.

More 913.

And it seems that the Parishioner of Common Right ought to bind his Corn in Sheaves. See *Rolls* 1. 644. y. 5.

Quære if the Parson must have notice of the setting forth of Tythes. 2 *Ventr.* 48. If Corn be standing, the Vendee shall pay the Tythes, but if he sett it after Severance the Vendor must. *Hardres* 381.

And where the custom was that the Parson should have the tenth Land from the Hedge, and the Parishioner neglects to sow the tenth Land, the Parson shall not have his Tythe in kind, but a special Action on this Case for not sowing it.

How the Tythe of Hay is to be paid.

Hob. 250.

Rolls 1. 644. y.

1, 2, 5, 6.

So for the Tythe of Hay, if the Parishioner have used to make it into Haycocks before they have set forth their Tythes, they must do so still, but where there is no such custom, they may set it forth in Grasscocks.

The same order ought to be observed in all other things arising from the Ground, as Rape, Saffron, &c. and other Fruit.

Rakings.

2 *Inst.* 652.

Cro. El. 660.

More 278.

Cro. Jac. 42.

But no Tythes are to be paid for the rakings of Corn, unless the Parishioner fraudulently scatter his Corn to couzen the Parson of his Tythes. *Roll* 1. 644. y. 5.

Littleton 31.

Yelverton 86.

Hetly 133.

Rolls 1. 645.

Z. 11, 12 & 13.

Aftermaths.

Neither are Tythes to be paid of the after-maths of Meadows, nor of balks in Corn-fields, or of the stubble of Corn: But if the Meadows be so rich, that there are two Crops of Hay got in one Year, or

two

two Crops of Woad, &c. there the Parson B. Still. *Eccl.* shall have Tythe as well of the latter as of *Cases*, 269. the former Crop.

If a Man gather green Pease to spend in his House, and there spend them in his Family, no Tythes shall be paid for the same; but if he gather them to sell or to feed Hogs, there Tythes shall be paid for them. *Rolls* 1. 647. 2. 11, 12. *Green Pease*.

Neither shall Tythe-Hay be paid for the Grass growing upon Head Lands, which are only large enough for the turning the Plow. *Infra* 383. *Headlands*. *Rolls* 1. 646.

But Tythe shall be paid of the Hay and Corn growing in Orchards, though the Tythe of the Fruit growing in them were paid the same Year, be it Apples, Pears, Cherries, &c. *Z.* 19. *2 Inst.* 652. *Orchards*.

There hath been some question about Fodder gotten in the Fenn Lands in Cambridgeshire and elsewhere, and spent upon Beasts of the Plow and Pail, whether it should pay Tythes or no; but it hath been resolved, That Tythes shall as well be paid of this Fodder, as of other Hay spent upon the Beasts of the Plow and Pail. *More* 683. *Cro. Jac.* 47. *Fodder*.

But it has been resolved, That for Grass cut in Meadows to feed the Beasts of the Plow, and not made into Hay, Tythes should not be paid thereof. *Grass cut in Meadows for Beasts of the Plow*. *Wells* versus *Crawly*, T. 1. *Car.* 1. B. R.

It hath been resolved, That Tares, Vetches, &c. cut green for the feeding Beasts of the Plow, by custom may be freed from the payment of Tythes, but not without custom. *Tares, Vetches cut green*. *Cro. Car.* 393. *Jones* 375. *2 Leonard* 27. *Ca. Sancta Ecclesia*.

There was a Canon made by Robert Winchelsea Arch-Bishop of Canterbury and his Clergy, in the Year 1305. whereby it was decreed,

decreed, that Omnes & singuli parochiani integre & sine diminutione decimas inferius annotatas Ecclesiis suis persolvant; scilicet, decimam lactis a primo tempore sue novationis tam mense Augusti quam aliis mensibus; de proventibus etiam boscorum pannagis Sylvarum & ceterarum arborum si vendantur, vivariorum, piscationum, fluminum, stagnorum, arborum, pecorum, columbarum, seminum, fructuum & bestiarum guarenarum, aucupitii, hortorum, curtilagiorum, lane, lini, vini & grani, turbarum, in locis quibus fabricantur & fodiuntur, cygnorum, caponum, aucarum, & anatum, ovorum, Thenetii agrorum, apum, mellis & cereæ, molendinorum, venationum, artificiorum, negotiationum, nec non agnorum, vitulorum, pullo-
 rum, equorum secundum eorum valorem, & omnium proventuum rerum aliarum de cætero satisfaciant competenter Ecclesiis quibus tenentur, nullis expensis ratione præstationis decimarum deductis, seu retentis, nisi tantum de præstatione decimarum, & negotiationum; Quod si monitionibus suis parere contempserint, per suspensionis, excommunicationis, & interdicti sententias eos ad præstationem decimarum hujusmodi compellant.

This Canon being a Provincial Canon of this Nation, and by consequence in force so far, as it is not crost by the Common Law, Statute Law, or Custom of the place, I thought fit to insert, though almost all the particulars therein are spoken to in their proper places, save that I have not met with *decima vivariorum* in any other Canon, which the Gloss says, is *loca in quibus pisces*
 pass

Verbo *Vivariorum*.
 2 Inst. 162,
 199, 100.

pascentur, & impinguuntur, and sometime it is taken * *pro loco ubi feræ includuntur*, with which Sir Robert Stapleton's Journal partly agrees; but what Tythes are to be paid for *Vivaries*, neither the Canon nor Gloss tells us, and I as little can give you an account what Tythes are due for *Curtilage*. *Thenesii agrorum* Mr. Lindwood tells us is, *Arborum crescentium circa agros pro clausura eorum*, which by the Common Law of England are to pay no Tythe; for the rest I refer to the proper Chapters.

* Sir Henry Spelmans Gloss verbo *Vivarium*.

Vid. Stat. 3 & 4 W. & M. c. 3. & 11 & 12 W. 3. c. 16.

CHAP. IV.

Where, and in what Cases, and in what manner the Tythes of Wood are to be paid.

IN the time of Stratford Archbishop of Canterbury, in or about the 17th Year of the Reign of E. 3. 1343. there was a Provincial Canon or Declaration made to this effect :

How and where Tythe Wood is to be paid.

Declaramus provisione concilii sylvam cæduam illam fore, quæ cujuscunque existens generis arborum in hoc habetur ut cædatur, & quæ etiam succisa rursus ex stirpibus aut radicibus renascatur; ac ex ea decimam utpote realem & prædialem parochialibus seu matricibus Ecclesiis persolvendam, nec non Sylvarum possessores hujusmodi

Canon. Lindwood c. Quamquam ex solventibus, &c.

*jusmodi ad præstationem decimarum lignorum
ipforum excisorum in eis sicut fæni & bladorum
omni censura Ecclesiastica fore Canonice com-
pellandos.*

*Exact Abridg-
ment, p. 40. nu.
51. & ibid. 80.
num. 37.*

But in or about the same Year there was a Petition in Parliament, That no Man should be impleaded in a Court Christian for Tythes of the Woods or Under-Woods, but in places accustomed, which was answered; as heretofore the same shall be.

The like Petition was in the 25th Year of E. 3. and other Parliaments, till at the length, in the 45th Year of the same King, an Act of Parliament was made to this effect, reciting,

*St. 45. El. 3. c. 3.
Tythes not to be
paid of great
Wood.*

That whereas they sell their great Wood of the Age of twenty Years, or of greater Age to Merchants to their own Profits, and in aid of the King in his Wars, Parsons and Vicars of Holy Church do implead and draw the said Merchants in Suit in the Spiritual Court for the Tythes of the said Wood, by the name of Silva cædua, whereby they cannot sell their Woods to the very value, to the great damage of them and the Realm: It is therefore by that Law ordained and established, That a Prohibition in this case shall be granted, and upon the same an Attachment, as hath been used before this time.

By which it appeareth that this Act of Parliament was but a Declaration of the Common Law, Prohibitions and Attachments thereupon in such case having been formerly used, and so was *Paston's* Opinion, 9 H. 6.

This

This Act of Parliament was after questioned by the Clergy, pretending it did not pass as an Act of Parliament, but only as an Ordinance, and so not binding. And thereupon the Commons in the next Parliament petitioned, That it might be enacted, that for Wood above twenty years growth, no Tythes should be due, and that in all such cases a Prohibition might be granted. To which was answered, That such Prohibition should be granted as then before had been used.

But Sir *Edward Coke* in his Commentary upon *Magna Charta*, does sufficiently prove it was an Act of Parliament.

1. Because it is entred upon the Parliament Roll amongst other Acts of Parliament. 2. It is under the Title in that Roll of Statutes of *E. 3. Anno Regni sui 45.* 3. It was proclaimed with the rest of the Acts of that Parliament. 4. It is penn'd in the form of an Act of Parliament, *viz, (It is ordained and established.)* 5. It hath the consent of the Lords and Commons. 6. There have been infinit Prohibitions upon it. To which let me add, That in the Parliament of *8 R. 2.* it was owned for an Act of Parliament, in which Parliament 'tis like many of the persons were present, that were at the making of the said Act.

And in *9 H. 6.* Exception was taken to the Prohibition, because it was not grounded upon this Statute.

And in the *11 H. 4.* It was affirmed by *Thirning* to be an Act of Parliament, and in force.

9 H. 6. 5. 6. a. T. 27 E. 1. 10 28. a. Prohibition in point. 50 E 3. 10. a. Exact Abridg. 118. nu 21.

Note it is Printed in Pinson's Edit. of Statutes.

2 Inst. 643. 644.

8 R. 2. Exact Abridg-ment of Record. nu. 21.

9 H. 6. 56. a.

11 H. 4. 9. a.

R

But

Seldens Hist.

de decim. 240.

2 Inst. 643.

644.

Rolls 1, 637.

But whosoever desires more satisfaction in this point, I refer them to Mr. Selden's *History of Tythes*, and the other places mentioned in the Margent.

Notwithstanding this Act, many questions were started what was *Sylva cadua*, and many Petitions in Parliament to have it declared, to which I find no positive answers, but sometimes referred to usage, and sometimes the King took time to advise.

Sylva cadua
quid.

50 E. 3. 10. b.

But Belknap a Learned Judge, 50 E. 3. declares, that *Sylva cadua* is to be intended of all manner of Wood that may be cut and will grow again; which all manner of Wood will do, as he there says, if it be preserved from Cattel; and therefore the Defendant in the Prohibition in that Case was put to Traverse, that he sued not in the Spiritual Court for the Tythes of gross Woods.

2 Inst. 643.

What shall be
said great
Wood.

ContraRoll. 1.

640. q. 5.

Plow. 470. a. b.

ContraRoll. 1.

640. q. 7.

Hob. 288.

Rolls 1. 640. q.

6, 7, 8.

Hob. 219.

Noy 30.

Cro. Jac. 199.

More 207.

Cro. El. 1.

That Birch is in
some places ta-
ken for Great
Wood and not
Tythable.

So that the question at this day chiefly is What shall be said to be gross Woods, To which question.

The Judges of the Common Law have resolved, That all sort of Wood that is usually employed for the building of Houses, Mills, &c. are gross Woods, and within this Statute: Of which sort there are Oak, Ash, Elm, Beech, Horse-beech and Horn-Bean, against the Opinion in *Molyn's Case*: *Asp* is likewise esteemed a gross Wood, being sometimes used for Timber; but for Willows, Hazels, Hollies, Maples, Birch, Alders, Thorns, &c. of what Age or Bigness soever they be, they are regularly to pay Tythes.

But

But if they be cut for fencing of Grounds, Cro. El. 499.
or for Fewel to be spent in the Houses of 609.
the Owner within the same Parish, no Lit. Rep. 241.
Tythes shall be paid of them, tho some be Rolls 2. 298.
left. Cro. El. 499. o. 1.

Cro. Car. 113. More 683.. Rolls 1. 644. z. 1, 2, 3. 2 Inst. 652.
Of what Wood Tythes shall be paid. Hetley 88.110

But if by Custom Tythes have been Rolls 1. 645.
paid of such Wood, the Custom is to be z. 8, 9.
observed.

So if a man cut Wood for the burning of Burning Bricks.
Bricks, which are imployed for the repair Rolls 1. 645. z.
of Houses and Buildings of the Owner with- 10.
in the same Parish, no Tythes shall be paid
for it ; but if he makes Bricks to sell, or for
making of Houses of Pleasure, or other
than for necessary Habitation, he shall pay
Tythe for the Wood spent therein, if tyth-
able.

If a Man convert his Land into a Nurseries..
ry for Fruit-Trees or other Trees, and sell Rolls 1. 637.
them for profit to such as transplant them e. 6.
into other Parishes, he shall pay Tythes of Cro. Car. 5 26.
them. Jones 416.

And if the Owner digs them up and sells Hardres 380,
them, then he shall pay Tythe; but if he 381.
sell them standing and the Vendee digs
them up, then he shall pay the Tythe.

If a Man cut his Copice-Wood, and pay
Tythe of them, and soon after grub up the Grubbed Wood.
Roots to Cleanse the Ground, he shall not Rolls 1. 637.
pay Tythes of them. c. 7.

Upon the whole matter it is left a little
uncertain which shall be accounted gross
Wood ; because in some Countries almost

The Parsons Counsellor: Part II.

the meanest sort of Wood is used for Building, and the Judgments in our Books vary, some allowing one thing for Timber, which another contradicts; but the proper and undeniable Wood for Timber are Elm, Ash and Oak, which are used for Timber in all Countries and places. It rests now to shew in what Cases such Woods as are accounted gross Wood shall pay Tythes.

If Oak, Ash, Elm, &c. which are esteemed Timber in the Countries where they grow, be cut under one and twenty years growth, they are accounted *Sylva cadua*, and ought to pay Tythe.

Loppings of Trees.

2 Inst. 643.

Cro. Jac. 100.

More 762.908

Plowd. 470. b.

Rolls 1. 640.

q. 1, 3, 4.

Co. 11. 48. b.

49. a.

But the Loppings of great Oaks, Ashes, &c. though the Lops be under twenty years growth, shall not pay Tythes; for they are privileged by the Bodies, neither shall Tythes be paid of the Shoots and Underwood, which grows from the Roots and Stocks of such Timber-Trees, and Trees above the Growth of twenty years, which have been felled.

Bark.

2 Inst. 643.

Co. 11. 49. a.

Nor shall Tythes be paid of the Bark of of such Trees as are Timber-trees, and privileged from the payment of Tythes.

But Tythes shall be paid of the Mast, Acorns, &c. of Timber-trees, because the same is of annual increase.

2 Inst. 643.

Dotards.

2 Inst. 643.

Cro. El. 477.

Rolls 1. 640.

q. 2.

Neither shall Tythes be paid of Timber-trees, which become dotards, and are become *arida, sicca, & non portans folia in aestate nec existens maheremium*.

Chap. 4. Of Law of Tythes.

245

If one lop Oaks, Ashes, &c. under twenty years of age, and after let them grow above twenty years of age, no Tythes shall be paid of them or their Lops.

More 908.
Co. 11. 49.a.
Rolls 1640. q.
1.

It hath been held, That if a Wood-ground be mixt with Woods tythable, and Woods not tythable, and the greater part be such as are not tythable, it shall privilege the rest, and pay no Tythe; but if the greater part be tythable, it shall pay the Tythe of such part as is tythable; for where the greater part is great Wood, the whole shall be called great Wood a *major*.

Woods mixt with great and underwoods.

Parsons Law, 99. T. 19. Jac. B. R. Buckhurst vers. Newman. Parson of Staplehurst. T. 36 El. B. R. per Henden.

It hath been a question among the Canonists, who shall pay the Tythes of Wood tythable, the Buyer or the Seller. Mr. *Lindwood* in his Gloss upon the Canon before recited, seems to be of Opinion, that the Buyer shall pay the Tythes, *Quia verum enim est quod decima sequitur fructus, & cum onere decimæ transferuntur fructus in alterum*; and this Opinion of his seems reasonable, where the Owner of the Wood sells the whole Wood together, or parcels it out, and the Buyers cut it; but if the Owner of the Wood cut it himself, and then sell it by parcels, there it seems reasonable, That the Owner of the Wood should pay the Tythe; but by the Common Law the Parson may sue the one or the other at his Election.

Who shall pay the Tythe of Wood. Lindwood c. Quamquam ex solventibus & verb. Sylvaram pos. & cap. Quia quidam maledictionis verb. asportam.

Rolls 1. 656.
l. 1.

And it is to be observed, That a whole Province, County or Hundred may prescribe in *non decimando* of Woods, as in the Wilds of *Kent* and *Sussex* and other places, and therefore the Commons in 17 E. 3.

Rolls 1. 637.f
Prescription of not tything of Wood.

R 3

upon

Rolls 1. 637

upon the making of the aforesaid Canon moved in Parliament, That no man should be drawn in Plea in the Court Christian for the Tythes of Wood or Under-wood, except in such places where such Tythes have been used to be paid; for by the strict Letter of this Canon, Tythes were to have been paid of all manner of Wood, great and small, in all places; to which the Answer is recorded, *Let it be done in this also, as hath been done before time.*

*The manner of
paying Tythe
Wood.*

The manner of the payment of Tythe-wood must either be by the measure of the Ground by Poles, Perches. &c. as 'tis in some parts of *Lincolnshire*, or every tenth Faggot, Billet, &c. as 'tis paid of Corn and other things; but in this, as in all other Cases, the Custom of the place is to be observed.

White versus
Aarach, M. 15
Jac. C. B.

But no Tythe shall be paid of Wood cut for Hop-poles to be used in the same Parish, where the Parson hath the Tythe of the Hops.

C H A P. V.

In what Cases Tythe is due for the Herbage or Agistment and Pasturage of Cattel, and who is to pay the same.

I Am now come to speak of the Tythe of Herbage, Agistment or Depasturing of Cattle, for which I find no Canon, save a Clause of a Provincial Canon of Robert Winchelsey, dated 1305. in these Words;

In what Cases Tythe Herbage is due.

De pasturis autem & pascuis tam non communibus quam communibus statuimus, quod decime fideliter persolvantur, & hoc per numerum animalium & dierum, ut expedit Ecclesie.

The Canon. Lindwood c. Quoniam propter.

The Tythe of Herbage or Agistment of Cattel is due, where the Owner or Farmer of any Lands, Depastures with barren Cattel that yield no profit to the Parson; which is a tenth part of the yearly value of the Ground so eaten, but commonly a twentieth part is accepted; but in this, as in all other Tythes, the Custom and Usage of the place is to be observed.

2 Inst. 651.

Cro. Car. 237. 559. Jones 524.

If the Owner of the Land agist it with Foreigners Cattel, the Owner of the Land shall pay the Herbage Tythe; but if he let the Ground to a Tenant, then the Tenant is to pay it. *Vide Hardres 184.*

Who shall pay it. Cro. El. 365.

But no Herbage Tythe shall be paid for the Agistment of Beasts bred for the

Cro. Car. 237. 559.

2 Inst. 651.

Herley 93.

Rolls 1. 641.

2. 9, 10.

Rolls 1. 641.

10. 4.

Bulst. 1. 171.

Poph. 126. 142.

Wild versus

Lampton, T.

infra. 249.

15. Jac. B. R.

per 3. Just.

versus Hough-

ton.

Saddle Horses.

Rolls 1. 641.

c. 4, 5.

Beasts bred for

the Plow and

Pail.

Plow and Pail, and so employed in the same Parish; nor for Beasts fed and spent in the Owner's House in the same Parish. *Vide Hardres 284.*

So if a Man eat a Ground with his own Saddle Horses, he shall pay no Tythe for the same; but if an Inn-Keeper eat up a Ground with Guest-Horses, he shall pay Tythes for the Herbage of them.

If a Forreigner that lives in another Parish depastures a Ground with Cattle bred for the Plow and Pail to be employed in a Forreign Parish, he shall pay Tythe for the Agistment of such Cattel. *Hardres 184.*

And there is no difference between the Case of a Parishioner and Forreigner, where the ground is eaten with unprofitable Cattel, and not bred for the Plow and Pail, &c. Saddle Horses and fatting Cattel, as aforesaid, to be spent in the Parishioners House; but that the Parishioner as well as the Stranger shall pay Tythe: But for the breeding of Cattel for the Plow and Pail, &c. conduces to the profit of the Parson in his other Tythes, and therefore no Herbage ought to be paid for the Agistment of them; But when they are turned off from work to be fatted for Sale, Tythes shall be paid for Herbage, because they are not beneficial to the Parson in any other Tythes, *Showers Rep. 193.*

Infia. 260.

2 Inst. 651.

Herbage of

Beasts *feræ natura*,*feræ natura*, F. N. B.

No Tythe is due to the Parson for the Herbage of beasts *feræ natura*, as Deer, Conies, &c. without a special custom.

Fix:

Fitzherbert in his *Natura Brevium*, seems to be of Opinion, That there is no Tythe due for the Herbage or Agistment of Cattel, and adds this reason, because they pay Tythe of the Cattel there depastured, which proves his meaning to be, that there is no Tythe Herbage due where the ground is depastured with profitable Cattel.

Where an Inn-Keeper eats a ground with Guest Horses, he shall pay for the Herbage of the Ground.

Hardres 35.
Supra. 248.

If a ground be eaten with profitable Cattel, as Milch Cows, Ews, Lambs and Cattel bred for Plow and Pail, &c. and also with barren and unprofitable Cattel, and the profitable Cattel exceed in number, it should seem the greater part being profitable, should free the rest, *tamen inquire.*

Pasture eaten
with mixt Cattel.

Rolls 1. 641. 9.
20.
Quære.

No Tythe Herbage is to be paid of the Agistment of Oxen, Horses or Beasts of the Plow, imployed and used in the same Parish, for they are profitable Cattel to the Parson. If a Ground be eaten with barren and unprofitable Cattel and Profitable Cattel together, and the profitable Cattel are the less in number, I conceive there is no doubt but the Landlord must pay Tythe, in kind for the profitable Cattel, and Tythe of the Herbage for the rest, and not Herbage for the whole.

Rolls 1. 640.
a. 6, 7.
Beasts of the
Plow.

Ground eaten
with mixt Cattel.

If there be a custom in the Country to sow Tares, Vetches, &c. and to eat them green upon the ground before they are ripe, with Horses and Beasts of the Plow, no Tythe shall be paid for the same.

Tares and
Vetches eaten
green.

Rolls 1. 647. a.
8 & 16.

If

Rolls 1. 647.

a. 8 & 16.

*Of what Cat-
tel Herbage is
due.*

Rolls 1. 646. a.

13.

If a Stranger or Parishioner buy barren Cattel, and depasture and feed them for Sale, he shall pay Tythe for the Herbage of them.

If a Man buy Oxen, Steers or Horses, and depastures, and after sells them, and doth not without fraud, imploy them in the Plow, he shall pay Tythes for their Agistment: And if he work them fraudulently, to defeat the Parson of his Tythes, it will not serve his turn.

Rolls 1. 647. a.

15.

So if a Man buys or rears young Cattel, and depastures them in a Parish, and does not imploy them there for a Plow or Pail without fraud, as hath been said, he shall pay Tythe for the Herbage of them.

P. 7. Jac. C.B.
Parsons Law.

But for the Grass of Fallows no Herbage shall be paid, because it is for the bettering of the Parsons Tythes in the year following; nor for the Grass of Stubble.

CH A P. VI.

Where and in what manner the Tythes of Calves, Milk, Cheese, Wooll, Lambs, Piggs, &c. are payable.

IN the payment of these sort of Tythes, I do not observe that the Common Law crosses the Canon in any thing material, and therefore I shall recite you the Provincial Canon made by Robert Winchelsey, and his Clergy, Anno Dom. 1305. which is to this effect.

How the Tythes of Calves, Milk, Wooll, Lambs, &c. are to be paid. It is doubted whether this Canon were made by him or not. See Lindwood in the Gloss.

De nutrimentis autem animalium, scilicet de agnis statuimus, quod pro sex agnis & infra sex oboli dentur pro decima; si septem sint agni in numero, septimus agnus detur pro decima Rectori: ita tamen quod Rector Ecclesie qui septimum Agnum recipit, tres obolos in recompensationem solvat parochiano a quo decimam recipit: Qui octavum recipit, det denarium: Qui vero nonum det obolum parochiano, vel expectet Rector usque ad alium annum, donec plenarie decimum agnum possit recipere si maluerit; & qui ita expectat semper exigit secundum Agnum meliorem vel tertium ad minus de Agnis secundi Anni, & hoc pro expectatione primi anni. Et ita intelligendum est de decima lanæ; Sed si oves albi in Hyeme & alibi in Aestate nutriantur, dividenda est decima; similiter si quis medio tempore emerit

The Canon. Lindwood, c. Quoniam propter.

rit vel vendiderit oves, & certum sit a qua Parochia illæ oves venerint, earundem dividenda est decima sicut de re quæ sequitur duo domicilia: Si autem incertum fuerit, habeat illa Ecclesia totam decimam, infra cujus limites tempore tonsionis inveniuntur: De lacte vero volumus quod decima solvatur dum durat, videlicet de caseo tempore suo, & de lacte Autumno & Hyeme, nisi parochiani velint pro talibus facere competentem redemptionem, & hoc ad valorem decimæ & commodum Ecclesiæ.

How Wooll and Lamb is to be paid.

Latch 254.
P. 14 El. Harpurs Rep.
Rolls 2. 308.
v. 21.
And this agrees with the Levitical Law.
Decimam partem seperabis de cunctis fructibus quæ nascuntur in terra per annos singulos, &c. Deut.c.14.
v. 22. & 23.

By this Canon the payment of the Tythes of Wooll and Lambs is settled in this manner, That if the Parishioner have under seven Lambs or Fleeces, he shall pay a half peny for every Lamb and Fleece; and if there be seven Lambs or Fleeces, and under ten, then the Parson or, &c. is to allow a half penny for every one that is wanting; but where this Canon gives the Rector election to take Tythes in this manner, or let them run on till a Lamb or Fleece be due in the ensuing year, that is not allowed by our Law, for Tythes must be paid annually; where Sheep are kept in one Parish in Summer, and another in Winter, the Tythes are to be divided: So if one buy in Sheep out of another Parish, the Tythe is to be divided, *i. e.* to each Rector, &c. his proportion for the time they were respectively kept in their respective Parishes; but if it be not known from whence Sheep so bought in came, then the whole Tythe is to be paid where the Lambs fall and the Sheep are shorn.

By

By the Canon the Tythe of Milk is to be paid in Cheefe whilst the Parishioner makes Cheefe, but in Autumn and Winter it is to be paid in kind: But this part of the Canon is generally over-ruled by the custom of the place; for in many places they pay the Milk in kind all the year; in some places they pay only Cheefe, and in some neither Cheefe nor Milk, but some small rate for it; And in some Countries they prescribe to pay no Tythe of their Milk at all; and the custom of the place in this, as in all other Tything, is to be observed, notwithstanding the Canon: But for the better explanation of the meaning of this Canon, there was a second Canon made, but the date thereof I cannot attain to; the tenor whereof follows:

Quoniam, ut audivimus, super decimis & nutrimentis animalium inter Ecclesiarum Rectores propter amotiones pecorum ad diversarum parochiarum pasturas diversis anni temporibus contentiones multimodæ oriuntur: Nos viam pacis preparare volentes statuendo definimus & definiendo statuimus, quod ad Ecclesias in quarum Parochiis oves a tempore tonsionis usque ad festum Sancti Martini in hyeme continue pastantur & cubant, Decima lanæ lactis & casei ejusdem temporis, licet postea amotæ fuerint ab illa Parochia & alibi tondeantur, integre persolvatur; & ne fraus fiat in casu prædicto, præcipimus, quod antequam oves amoveantur a pasturis vel etiam distrabantur, Ecclesiarum Rectoribus sufficienter de solvenda decima caveatur. Quod si infra prædictum tempus ad diversarum

Lindwood c.
Quoniam audivimus.
Canon where
Sheep, &c. shift
their Pasture
from one Parish
to another.

sarum parochiarum pasturam transferantur, quolibet Ecclesia pro rata temporis portione decimam recipiet earundem minori triginta dierum spatio in rata temporis minime computando. Si vero per totum tempus prædictum cubant in una parochia & pascantur continue in alia, inter ipsas Ecclesias decima dividatur. Quod si post Festum Sancti Martini ducantur ad pascua aliena, & usque ad tempus tonsionis in una vel diversis parochiis sive in propriis pasturis dominorum suorum sive alterius cujuscunque pascantur, habita ratione ad numerum ovium pascua æstimentur & secundum æstimationem pascurum ab eorum dominis exigantur decimæ: Decima vero lactis & casei de vaccis & capris proveniens ubi cubant & pascuntur, ibi solvatur. Alioquin si cubant in una parochia & pascuntur in alia parochia, decima inter rectores dividatur omnino. Agni vero, vituli, pulli Equini & alii factus decimales habita ratione ad loca diversa ubi gignuntur, oriuntur & nutriuntur, & ad moram quam traxerint in eisdem, particulariter decimentur. Quid vero pro decima debeatur, ubi lac propter paucitatem vaccarum vel ovium ad caseum faciendum non sufficit; Et quid pro agnis, vitulis, pullis equinis, velleribus, aucis, aut aliis hujusmodi, de quibus propter eorum modicitatem decima certa dari non potest, consuetudini locorum duximus relinquendum. Item præcipimus quod si quis post Festum Sancti Martini oves occiderit, vel si oves quovis casu fortuito moriantur; Decimam legitimam parochiali Ecclesia solvere non postponunt. Et si oves extraneæ in alicujus parochia tondeantur, Decima ibidem tradetur Rectori ecclesiæ, nisi sufficienter doceri posset quod pro decima alibi satisfactum ut solv-

Milk and
Cheese.

*solutionem ibidem faciendam modo legitimo
valeat impedire.*

There may some question be made upon Verbo inter the first Paragraph of this Canon, whether gre. the Rector where the Sheep are kept from shearing till *Marblemas*, should have the whole Tythe of the Sheep for the whole year? But Mr. *Lindwood* in his Gloss conceives it is intended the whole Tythe that ariseth during that time, which for Sheep will be nothing at all; but certainly it were very unreasonable that the Rector of the Parish where Cattel are kept but for half the year, should have the whole Tythes, and it cannot be intended to be any more than the proportion for the time they are so kept.

But by this Canon, if Sheep be kept less than thirty days in any Parish, no rate is to be allowed the Rector of that Parish where they are kept so small a time. *Sheep kept less than thirty days.*

If Sheep be bought in a little before Share-day, and it is not known that they answer the Tythes elsewhere, the whole is to be delivered to the Rector of the Parish where they are shorn.

Where the Milk is so little that it will not make Cheefe, or the Calves, Lambs, Fleeces, Colts, Geese, &c. are so few in number that there will none fall to the Parson, the Canon gives no Rule of Tything in that Case, but refers it to the Custom of the place: But the Canonists generally hold, that Custom to pay less than a tenth part is not binding; for says *Lindwood*

Custom to pay
less than the va-
lue of Tythe.
Verb consuet.
oc.

wood, Quod laici minus solvant quam decimam non potest consuetudine introduci, quia esset contra jus divinum; plus tamen potest deberi ex consuetudine. And concludes, Quod autem hic loquitur de consuetudine locorum, intelligas de tali consuetudine quæ non excludit solutionem decimæ, sed de tali quæ limitat ipsius decimæ solutionem ad commodum Ecclesiæ, scilicet ad verum valorem vel amplius: Herein I perceive the Canonists and Common Lawyers agree, that a Custom to be free from payment of any Tythe, or a Rate for it, is not good, except it extend to a whole Country, County, &c. and that where there is a competent Livelyhood for the Minister beside; but the Common Law allows of Customs and Prescriptions, where Money or some other thing is paid in lieu of Tythes though not to the full value, as shall hereafter be made appear in its proper place.

By this Canon it is provided, That where Cows feed in one Parish, and lodge in another, that the Tythes shall be divided.

Poph. 197.

For the Tythes of Lambs, Calves, Colts, &c. the Tythe of them by this Canon is to be apportioned with respect to the places where they were engendred, brought forth and nourished.

If a Mans Sheep dye or be killed after *Martlemas*, a proportionable Tythe must be paid for them.

The time when
Calves, Lambs,
Pigs, &c. are to
be paid:

The time of the payment of the Lambs, Kids, Calves, Pigs, &c. is regulary when they are so old, that they may be weaned and

and live without the Dam, unless the Custom of the place confine the payment to any certain time or age; and Wool is to be paid at Sheer-day.

If several Mens Sheep depasture together in one Flock, or under one Shepherd, yet this shall not make them to be tythed together, but every Owner shall pay his Tythe of them by himself; but if the Head of a Family have his Flock mixt with his Childrens Sheep, which are under his Tuition, and he takes the profit of them to his own use, in that case they shall be tythed together.

Lindwood c.
Quoniam propter verb. lana.
Several Mens
Sheep depasture
together.

It hath been resolved that where Tythe Fleeces of Wool are paid, there shall be no Tythe paid of the Locks and Belts; but this seems to be intended of Locks casually lost.

Cro. El. 363.
T.
Wool Locks.
More 911.
Rolls 1. 645.
7. 14, 15, 16.
Bulst. 1. 3. 242.
Neckings.

There is a Custom in some Countries to shear their Sheep about the Necks at Michaelmas, that the Wool may not in Winter be pulled off with Bryars, and for this sort of Wool without Fraud, it hath been held that no Tythe shall be paid; and so of the birling of Sheep without Fraud, no Tythe is to be paid.

Rolls 1. 646.
2. 17.

If a Man's Sheep die of the Rot or other Disease, or if the Owner kill or sell them as hath been said, he must pay Tythe for the Wool ratably.

Rolls 1. 646.
2. 18.
Sheep die of
the Rot.
Latch. 254.

Though the Canon direct one of seven to be paid only for Wool and Lambs, yet in most places the same Order by Custom is observed for Calves, Colts, Pigs, Geese, &c. which Custom I presume took

S

its

Cap. Sancta
Ecclesia verb.
eorum valo-
rem.
Lindwood c.
*Quoniam pro-
pter verbis de
Caseo.*

Stat. 2. E. 6.
c. 13.

Lindwood de
*decimis, cap.
Quoniam audi-
vimus.*

its rise, beginning from this Canon.

By the Canon Law where there is no customary manner of Tything for the Tythe of Pigs, Geese, Calves, Colts, &c. where they fall short often, the tenth part of the Value is to be paid.

And note, That where Tythe Milk is paid in kind, there no Tythe Cheefe is due, and so where Tythe Cheefe is paid for so long, no Tythe Milk is to be paid.

Lastly note, That where any Person hath Cattel tythable going in a Ground or Common whereof the Parish is not known, the Tythe is to be paid in the Parish or place where the Party lives that owns the Cattel.

Where Sheep lodge in one Parish, and depasture in another, there the Tythes are likewise to be divided.

CHAP. VII.

Where, and in what manner Tythe of Seeds, Fruit, Mast, Bees, &c. is to be paid.

*How the Tythe
of Seed, Fruit,
Mast, Bees, &c.
is to be paid.*

TYthes are to be paid of the Fruits arising in Orchards and Gardens in their proper kinds when gathered, unless there be some *modus* or rate Tythe paid in lieu thereof, and so of the Seed of Flax, Hemp, &c. is to be paid when drest up; but this must be understood where the Tythe of the Hemp and Flax is not paid

till

till after the Seed is gathered; for if the Tythe be paid before the Seed threshed, ripld out or gathered, then no Tythe-Seed is to be paid of the rest. The Tythe of Crabs, Mast, &c. is likewise to be paid when the same are gathered, or satisfaction is to be given if eaten with Swine on the ground. But in a Case reported by my Lord Keeper *Littleton*, it is held that no Tythes are to be paid for Acorns which fall from the Trees, and are eaten up by the Swine. *Ideo quare.* And the Tythe of Bees is to be paid by the tenth part of the Honey and Wax: The Canon is that,

Lindwood c. Sancta Ecclesia
Rolls 1. 640.
q. 10.
Co. 11. 49. a.
Littl. Rep. 40:

Cro. Car. 559.
Jones 447.
F. N. B. 51. g.
Rolls 1. 635.
c. 1.

De Apibus, sicut de omnibus aliis bonis juste acquisitis quæ renovantur per annum statuimus, quod decime solvantur & exigantur debito modo. Cap. Quoniam propter.

Nota, That it was held in the Case of *Crouch* and *Risden*, that there can be no *modus* for Hops, because of late date; but they may be included in a *modus pro decimis minutis*. And *Twisden* said in this Case, that the Law was not settled in this Case, how the Tythe of Hops should be paid, by the Pole, Pound, or, &c.

Siderfin 443.

C H A P. VIII.

Where and in what manner Tythes of Pidgeons, Conies, Fish, Deer, and other Beasts and Birds feræ naturæ, are Tythable.

Fulbec. Direc.
59. a.

Supra 248.

2 Inst. 651.

Hardres. 188.

*Whether Tythe
be due of Beasts
or Birds feræ
naturæ.*

Cro. Car. 264.
339.

March. 87.

Herley 13.

Rolls 1. 635.

c. 4, 6, 7.

Noy. 108.

St. 2 E. 6. c. 13.

Rolls 1. 635.

c. 3.

See March's

Reports, 26.

Rolls 1. 636.

c. 5.

See Mod. Rep.

2d par. 77.

Herley 147.

Rolls 1. 644.

2. 4, 5, 6.

More 599.

BY the Common Laws of *England* there is no Tythe due for Birds or Beasts that are *feræ naturæ*, and therefore it hath been resolved, That no Tythe shall be paid for Fish taken out of the Sea or River, unless by Custom, as in *Wales, Ireland, Yarmouth, &c.* neither for the same reason, is any Tythe due of Deer, Conies, &c. but if due by Custom it must be paid.

And if a Man keep Pheasants, or other wild Fowl within limits, by clipping their Wings, yet no Tythes shall be paid of their Eggs or Young not being reclaimed, for as much as if their Wings were not cut, they would fly away.

Ferrets, Hawks, Popinjays, are not Tythable. *Fulb. Direct. 58. b. 59. a.*

But of young Pidgeons in Dovecoats or in Pidgeon-holes about a Man's House, Tythes shall be paid if they be sold; but if they be spent in the Family, no Tythe shall be paid for them.

It is said in *Houghton and Prince's Case* in *More's Reports*, That no Tythes shall be paid of tame Turkeys, Pheasants or Partridges, nor their Eggs, *quia feræ naturæ*; but

Chap. 9. Of Law of Tythes.

but I believe the Book is misprinted, for after they are reclaimed, they cannot be said to be *feræ naturæ*.

The Custom of Tything Fish is confirmed by Stat. 2 & 3 Edw. 6. cap. 13. And Bishop Stillingfleet is of opinion, That by the Old Constitutions Fish are as tythable as other things. *Still. Eccl. Cases, 272.*

See a Review of this Chapter in *Stillingfleet's Eccles. Cases, 270.*

C H A P. IX.

What Tythes are to be paid for Mills, and what kind and nature they be of, and of what things Tythes are not payable.

THE Canon is, Cap. *Quoniam propter De proventibus autem molendinorum volumus quod decimæ fideliter & integre solvantur.* *Whether Tythes are to be paid of Mills, and how.*

And *Articuli Cleri, cap. 5.* is to this purpose.

Si quis in fundo suo molendinum erexit de novo, & postea a Rectore loci exigatur decima de eodem, exhibetur Regia prohibitio sub hac forma. Quia de tali molendino hætenus non fuerunt solutæ, prohibemus, &c. Et sententiam excommunicationis, si quam hac occasione promulgaveritis, revocetis omnino. Responsio: In tali casu nunquam exiit Regia Prohibitio de Principis voluntate, qui & decernit talem perpetuum non exire.

² Inst. 622.
Littl. Rep.

It is made a question first, Whether any Tythes are due for Mills or not ? which Sir *Edward Coke* in his second Institutes says, was never judicially determined that he knows of : And it was held in the Case of a Fulling-Mill no Tythe was due ; for of Profits that come only by the Labour and Industry of Man no Tythe is to be paid, and the same reason holds for Corn-Mills.

Cro Car. 523.
524.

The next question is, admitting that Tythes are due for Mills, Whether the same be predial or personal ?

Sir *Edward Coke* is of Opinion, That in case any Tythe be due, it is only a personal Tythe, being acquired by the Labour and Industry of the Miller, and takes no increase from the ground to make it predial : And the Statute of 2 E. 6. is, That every Person shall justly set forth, yield and pay all predial Tythes in their proper kinds, as they arise and happen, which cannot be applied to the Miller's taking of the Toll-dish, nor to Fulling-Mills, Iron-Mills, Paper-Mills, &c. which are all comprehended under the word *Mill*, and no Tythe can be paid *in specie* ; for if the Parson should have every tenth Toll-dish, then it would often happen, that he should have twice Tythe of the same Corn, which is against the Law ; and such Tythe as the tenth Toll-dish has never been paid in any place that I have known or heard of.

Bulstr. 3. 212.

And if it be a personal Tythe, as there is great reason that it can be no other, then it must be paid with the deduction

of the Expences and Charges, and it is not payable but in such places where personal Tythes are payable by Custom: See more hereof in the twenty second Chapter.

But the Canonists hold, That the tenth Cap. Quoniam propter verbo integrale. Toll-dish shall be paid as a predial Tythe, without deduction of Expences; which doth not agree with the Common Law, and is therefore not binding.

But in many places there is a rate Tythe paid for Mills, which is good by Custom.

But there are great diversity of Opinions as to Tythe of Mills, for which the Reader may further consult *Cro. Jac.* 429. *Selden de Dec.* 423. 2 *Inst.* 621. *March. Reports* 15.

For Wind-mills, see *Decret. lib.* 3. *Tit.* 3. *cap.* 23. *fol.* 450.

CHAP. X.

Whether Tythes ought to be paid of Hawking, Hunting, Fishing, Fowling, &c.

THese are all comprehended under personal Tythe, for that these things being obtained by the labour and industry of the Party, and the things obtained are *feræ naturæ*, and not of their own nature tythable in their proper kind, unless the particular Custom of the place require it, and therefore I shall refer these to the twenty

Tythe of Hawking, Hunting, Fishing, Fowling, if due.

C H A P. XI.

*Of Tythes of Ducks, Geese, Hens, Swans,
 and other domestick Fowls and Birds.*

*Of the Tythes
 of domestick
 Birds and Fowl.*

THE Tythe of all tame and domestick Fowl is to be paid in their Eggs or young in their proper kind, according to the Custom of the place: Geese, Ducks and Swans are usually paid in their kind, but of Hens and Turkies, commonly in Eggs, but therein the Custom of the place is to be observed. But note, That where they pay Tythe of the Eggs, there is no Tythe of the Young, nor *e converso* Tythe Eggs paid, where they have the Tythe of the Young.

C H A P. XII.

Of what things Tythes shall not be paid.

*Calthrop's Re-
 ports, 108.*

*Of what things
 Tythes shall not
 be paid.*

Co. 11. 16. a.

Hob. 11.

*Calthrop's Re-
 ports, 108, 110.*

TYthes regularly are not due of Dwelling-Houses, and yet a *modus* may be due for a House as well as for Land; and it shall be intended, that it was a *modus* for the Land before the House was built.

No

No Tythes shall be paid for Hounds, Apes, Popinjays, & similia, because they are things only of Pleasure.

Things of Pleasure.

11 H. 8. 4. b.

2 Inst. 651.

Neither shall any Tythes be paid of those things which do not increase from Year to Year; and therefore no Tythes shall be paid for Stone got out of Quarries, Pit-coals, Turfs, Slates, Bricks, Quarrels, Tyles, Earthen Pots, nor of any thing made of Earth, nor of Marle or Lime got for the Improvement of the Ground; nor of Tin, Lead, Copper, or other Metal gotten out of the Ground, but by Custom Tythes of such things may be due and payable. *Stillingfleet's Eccl. Cases, 265.*

Calthrop's Reports, 109.

Things that increase not.

Rolls 1. 636.

d. 1.

Doct. & Stud.

174.

1 Mod. Rep.

35.

2 Mod. Rep.

77.

More 908.

Cro. El. 277.

More 908.

2 Inst. 651.

Rolls 1. 637.

e. 1.

Doct. & Stud.

174.

Baxter versus

Hope.

H. 8. Jac. C.B.

Rot. 1. 109.

St. 2 E. 6. c. 13.

More 910.

Rolls 1. 640.

q. 12, 13, 16,

17.

2 Inst. 651.

Lit. Rep. 311.

More 909.

Servants in Husbandry shall not pay personal Tythes, neither shall any Tythes be paid of Marriage Goods.

No Tythes shall be paid of Aftermaths, Stubbles, or Rakings of Corn without Fraud. *Stillingfleet's Eccl. Cases, 269. Semb. contra.*

No Tythes shall be paid of Birds or Beasts that are *feræ naturæ*, &c. unless they be fold.

Tythes shall not be paid of Broom or Gorse used for Fuel within the Parish.

No Tythes shall be paid of Gravel and Chalk. 1 Mod. Rep. 35. per *Twisden*.

C H A P. XIII.

What force Custom has, as well in the form and manner of Tything, as in the discharge of the payment thereof; and wherein Custom and Prescription differ.

St. 2 E. 6. c. 13.
What force Custom has in the manner of Tything.

BY the Statute of 2 E. 6. it is enacted, That every of the King's Subjects should from thenceforth truly and justly, without Fraud or Guile divide, set out, yield and pay all manner of their predial Tythes in their proper kinds, as they should arise and happen in such manner and form as had been of Right yielded and paid within forty Years next before the making of the said Act, or which of Right or of Custom ought to have been paid.

In this Act there are three Qualifications.

1. It injoyns the payment of such Tythes as had for forty Years then past been of right yielded and paid.
2. Such as of right ought to have been paid.
3. Such as by Custom ought to have been paid.

Tythes due by Custom are of two kinds.

1. Where there is a *modus decimandi*, and by Custom Money, or some other thing, is paid in lieu of Tythes.

And this is confirmed by the Stat. of 2 E. 6. cap. 13. Selden de Decimis, 285, 286.

2. Where Tythe hath by Custom been paid of things not tythable, as of Lead in Derbyshire; Tynn in Devonshire and Cornwall; fishing in the Sea, as in South-wales, where

where the Custom is, That if the Parishioner of one Parish land his Fish in another, the Tythes are divided between the Parson of the Parish where the Fisher lives, and the other where he landed his Fish; but if the Parishioner land his Fish in the Parish where he himself dwells, then the Rector of that Parish has the whole Tythes.

And I have heard that in some Countries they pay Tythe-Ale, and Tythe of Limekilns, &c. which in their own natures are not tythable. Tythe Ale is said to be paid at *Market-rising* in *Lincolnshire*.

Tythe-Ale.
Rolls 1. 642.

And as by Custom things may be made tythable, which in their own natures are not so; or one thing may by Custom be paid in satisfaction or discharge of another: So Custom hath a great influence upon the form and manner of Tything, for the direction of the time, place and order of payment of Tythes.

2 Inst. 664.
Selden de Decim. Pref. 8, 9.
Hob. 250.

And as Custom may make things tythable, which of their own nature are not tythable; so a Custom of a Province, County or Hundred may discharge the payment of Tythe of a thing which in its own nature is tythable, so there be a Competency for the Maintenance of the Ministry beside.

Custom of not Tything, where good.

And therefore in the Wilds of Kent and *Sussex* they do pretend by Custom to be free from the payment of Tythe Wood, or any thing in lieu of it; and so in several Countries they pay no Tythes of their Milk, *Dunton* *vers. Moyle*, *Fmch* 36 *Eliz.*

Hob. 266.
Bulstr. 2. 245.
Doct. & Stud. cap. ult.
Rolls 1. 642.b.
1. & p. 5, 6, 8.
Co. 11. 16. a.

And

*Custom to pay
Tythes of things
not tythable.*

Rolls i. 642.
s. 7.

*Difference be-
tween Custom
and Prescrip-
tion.*

*How to plead a
Prescription.*

And as Custom may prevail in not Tything; so it may, as has been said, make things tythable which in their own natures are not tythable, as the Rent of Houses, Pigeons eaten in the House, Wood spent in the House: And by Custom Tythe may be paid of Salt, Brick, Lime, Ale, Chickens and other things not tythable.

Now the difference between a Custom and a Prescription is this; every Custom must have dimension, and alledged to be within some certain Province, County, City, Hundred, &c. for if it be a general Custom of *England*, it is Common Law, and such Custom must be common to all within such Limits; but if it be confined to one certain Person, House, Land or other thing, there it becomes a Prescription which is a younger Daughter to Custom, and therefore when a Man comes to plead a Custom, the manner of pleading is to alledge that within such a County, Hundred or Town, there is, and from the time whereof the Memory of Man is not to the contrary, there hath been such a Custom used and approved in the same, that is to say, that, &c. alledging the Custom as it is.

But when you come to plead a Prescription, you only alledge that you, and all those whose Estate you have in such Lands, have time out of mind paid so much annually to the Parson of *D.* in full satisfaction and exoneration of all the Tythes arising upon the said Lands, &c.

So that Custom and Prescription differ in these things, that Custom must be limited and confined to some certain place; Prescription is at large; Custom is common to all the Persons and Lands within the Limits wherein it is alledged, but Prescription is confined to certain Persons or Things: But in this they agree, That they must be constant without Interruption, and perpetual from the time whereof the Memory of Man is not to the contrary; for if there have been frequent Interruptions, there can be no Custom or Prescription obtained; but after a Custom or Prescription is once duly obtained, a disturbance for ten or twenty Years shall not destroy; for *Multi-plex interruptio non tollit præscriptionem semel obtentam.*

Wherein Custom and Prescription differ.

1 Inst. 114. b.

2 Inst. 653.

2 Inst. 654.

But I must here observe to the Reader, that though the Civil and Ecclesiastical Laws do in some Cases take notice of Custom and Prescription; yet in this they differ from the Common Law, that they allow a usage for forty Years to be a good proof of a Custom or Prescription, grounding their Judgments upon a decretal Epistle of Pope Alexander the Third, Anno Dom. 1180. But this Kingdom never allowed of that Epistle, or yielded any Obedience thereunto: So that as well in Spiritual as Temporal Prescriptions and Customs, if they come to be tried at Common Law, as all Prescriptions concerning Tythes must be, they must be proved to have been used beyond the Memory of any Man to the contrary; for if any Man living, or any

How the Ecclesiastical Laws look upon Customs and Prescriptions.

In what they differ from the Common Law in this matter.

Authen-

2 Inst. 653.

*What influence
Custom and Pre-
scription have
in the manner
of Tything.*

27 H. 8. c. 20.

Authentick Record, or other evidence prove it was otherwise at any time since the first Year of *Richard the First*, which was *Anno Dom. 1189.* the Custom or Prescription fails.

And the Influence, Custom and Prescription have in the manner of tything, is confirmed by three several Acts of Parliament.

First, By the Statute of 27 H. 8. whereby it is enacted, That every Subject of England, &c. according to the Ecclesiastical Laws and Ordinances of the Church of England, and after the laudable Usages and Customs of the Parish, or other place where he dwelleth or occupieth, shall yield and pay his Tythes, Offerings, and other Duties of Holy Church, &c.

By this Statute the Ecclesiastical Laws and Canons are affirmed for the payment of Tythes; but in such Cases as they are contrary to the Common Law or Customs of the place, they do not bind.

Next, this Act confirms and allows all Usages and Customs of the place where the Tythes arise, which are to be preferred before all Canons and Constitutions in manner of Tything.

32 H. 8. c. 7.

The next Statute is that of 32 H. 8. whereby it is enacted, *That every Person, &c. shall fully, truly, and effectually set out, yield to pay all and singular Tythes and Offerings aforesaid, according to the lawful Customs and Usages of the Parishes and Places where such Tythes or Duties should grow, arise, come or be due.*

This Act seems only to extend to customary Tythes, and so doth the Statute of

2 E. 6. c. 13.

2 E. 6. which is,

That

That every of the King's Subjects should from thenceforth, truly and justly, without fraud or guile, divide, set out, yield and pay all manner of their predial Tythes in their proper kind as they arise and happen, in such manner and form as hath been of right yielded and paid within forty Years next before the making of the said Act, or of Right or Custom ought to have been paid.

But more of these Statutes in their proper place. I shall now proceed to shew what Liberty and Privilege the Parson, Vicar, &c. hath in the Grounds where the Tythes arise, for the drying, ordering and carrying away their Tythes.

C H A P. XIV.

What Privilege and Liberty the Parson, Vicar, &c. hath in the Ground where the Tythes arise, for the drying, making, ordering and carrying away the same.

BY the Statute of 2 E. 6. it is enacted, 2 E. 6. cap. 13. *That at the Tything time of predial Tythes, What Privilege it should be lawful for every Party to whom the Parson, &c. hath in the Land where the Tythes grow. any Tythes ought to be paid, or his Deputy, or Servant, to see the said Tythes to be set forth and severed from the nine parts, and the same quietly to take and carry away.*

This Statute, as to the taking and carrying away, seems only declarative of the Com-

Rolls 2. 302,
q. 19.

Common Law: But as to coming upon the Lands to see the Tythes set forth, seems to me to be a new Authority given by this Law, for the Owners of the Land are *de jure* bound to set forth their Tythes duly and rightly; and if they fail therein, the Parson, Vicar, &c. have their Remedies; and if the Parishioner do justly and truly set forth his Tythes, although the Parson, Vicar, &c. be not present, or had no notice given him to be present, yet this had been a good setting forth before this Statute: But it is a fair and just way to do it in the presence of the Parson, Vicar, &c. And note, this Act is warily penned in the singular number, that the Party himself, his Agent or Servant may come to see the Tythes set forth, but must not come with a greater number.

And note, That the Parson, Vicar, Impropiator or Farmer cannot come himself, and set forth the Tythes without the Licence and Consent of the Owner of the Corn, Hay, &c. for if the Parson, Vicar, &c. shall of his own head tythe the Corn, Hay, &c. of any Land-holder within his Parish, &c. and carry it away, he is a Trespasser, and an Action will lie against him for it.

Jones 90.

Lindwood c.
Quia quidem
& cap. Erroris
damnabilis.

But a Parson, Vicar, &c. may *de communis jure*, after the Tythes are set forth, come himself, or his Servants, and spread abroad, dry and stack his Corn, Hay, &c. in any convenient place or places upon the Ground where the same grew, till the same be sufficiently weathered, and fit to be carried into

into the Barn, &c. But the Parson, Vicar, &c. must not take a longer time for the doing thereof than what is convenient and necessary; and what shall be said a convenient and necessary time, the Law doth not, nor can define; for the quantity of Hay, Corn, &c. and the Weather in this case is to be considered; and what shall in this, and all other Cases of like nature be said a reasonable and convenient time is to be determined by the Jury, if the point come in Issue triable by a Jury; but if it come to be determined upon a Demurrer, or other matter of Law, the Judges of the Court where the Cause depends are to resolve the same.

12 E. 4. 6. a.
Rolls 1. 643.
x. 2.

And if the Parson, Vicar, &c. shall exceed a convenient and necessary time in the drying, ordering and carrying away their Tythes; and the Parishioner shall receive Damage thereby; an Action of the Case will lie against them for their negligence in this behalf.

Huges Reps
329.

But no Action will lie against the Parson, Vicar, &c. in such a case, unless the Parishioner have duly set forth his Tythe, and given notice thereof to the Parson, Vicar, &c.

Styles 342.
Styles 348.
Lampen vers.
Woodner, P.
1 Car. 1. B. R.
per Latch.

And the Parson, Vicar, &c. may carry his Tythes from the Ground where they grew, either by the Common way, or any such way as the Owner of the Land useth to carry away his nine parts.

Halfey versus
Halfey, H.
6 Car. 1. B. R.
Rolls 1. 643.
x. 3.

But if the Owner of the Soil, after he has duly set forth his Tythes, will stop up the ways, and not suffer the Parson, Vicar, &c.

to carry away his Tythes, or to spread, dry and stack them upon the Land, this is no good setting forth of his Tythes without fraud, within the Statute of 2 E. 6. but that the Parson, Vicar, &c. or other Owner or Farmer, may have an Action upon the said Statute, and may recover the treble value; or may have an Action of the Case for such disturbance, as I conceive; or he may, if he will break open the Gate, Fence, &c. which hinders him, and carry away his Tythes; but in that he must be cautious that he commit no Riot, nor break any Gate, Rails, Lock, Hedges more than necessarily he must for his passage.

Bulst. 1. 108.

And note, That the Parson, Vicar, &c. when he comes with his Carts, Teams or other Carriages to carry away his Tythes, must not suffer his Horses, Oxen, &c. to eat and depasture the Grass growing in the Grounds where the Tythes arise, much less the Corn there growing or cut; but if his Cattel (as cannot be avoided) do in their passage, against the Will of the Drivers, here and there snatch some of the Grass, &c. this is excusable.

Rolls 2. 284.
f. 21.

And if the Parishioner duly set forth his Tythe of Hay or Corn, and will not permit the Parson, Vicar, &c. to make the Hay, or spread and dry the Corn, as he ought, it amounts to a subtraction of the Tythes, and the Parson may sue for the subtraction of such Tythes in the Spiritual Court, and no Prohibition lies in this Case.

C H A P. XV.

To what Charges the Glebe Lands belonging to a Rectory, and the Tythes are subject.

SIR Edward Coke tells us, *Quod nullus pro decimis, quæ sunt spirituales, de aliqua reparatione pontis, seu aliquibus oneribus temporalibus onerari debet.* 2 Inst. 641. *What Charges Tythes and Church lands are subject to.*

That Tythes being Spiritual, were not subject to Temporal Charges at the Common Law.

And Sir Edward Coke is of Opinion, 2 Inst. 641. That at this day, if Tythes be in the hands of Temporal Men, they are by reason of them contributory to Temporal Charges.

And upon a doubt of Mr. Justice Yel-P. 5 Car. 1. *Yerton*, who was Justice of Assise in the *Callis* 132. Bishoprick of *Durham*, as Sir *Nicholas Hide*, heretofore Chief Justice of the *King's-Bench*, has reported, it was resolved by all the Judges of *England*, That Tythes are at this day chargeable with all Charges imposed by any Act of Parliament, wherein they are not excepted, as upon the Statute of 43 *Eliz.* to the Poor, and to maimed Soldiers, *King's-Bench*, *Marshalsey*, *Bridges*, &c. But they are not subject to any Charges Temporal, at or by the Common Law. *Styles* 162. per *Rolls*.

And so it was lately held by my Lord Chief Justice *Hales* and the Court of *King's-Bench*, *Web* versus *Batcheler*. T. 1675. B. R. per *Hunt*.

Bench, for Watch and Ward, and repair of the High-ways: And this Case then vouch-ed by the Chief Justice.

First-Fruits.

See more of this
matter and

Tenth, 4 Inst.

120, 121.

* Cowel verbo
Annates.

How these differ
from the First-
Fruits under
the Law.

Vide Tho.

Aquinas, 20,

22. 786. Art. 4.

Polyd. Virgil.

De inventioe

rerum, l. 1. c. 2.

p. 498.

But Tythes at this day are subject to pay First-Fruits or Annates, in Latin *Primitia*, which are the first Years Profits of every Spiritual Benefice at a new Incumbents en-try into his Living*; they were anciently exacted by the Pope of Rome, when he had small Revenues to support the publick Charge of his place. And *Polydore Virgil* tells us, *Ceterum nullum inventum majores Romano Pontifici cumularvit opes quam annatum*

quas vocant.

And *Polydore Virgil* tells us, that Pope *Boniface* the ninth first introduced them, tho others ascribe them to *John* the two and twentieth. See *Platina* in the Life of *Boniface* the ninth.

But some are of an Opinion (and not without reason) that Annates were much ancier than Pope *Boniface* the ninth, who entred upon the Papacy in the Year 1389. and *John* the two and twentieth, not till the Year 1410. But it appears by our Parliament Rolls (which are infallible Evidence) that this Payment had reach'd England, in the 25th Year of the Reign of E. 3. which was in the Year of our Lord, 1351. in which Year there was a Complaint made by the Commons in Parliament, That the Pope had reserved to his own Collation as well the Abbies and Priories, as also all other the great Benefices, whereof any Ecclesiastical or Religious Persons had the Patronage; and that he had

lately

ately reserved all the Dignities in England, and the * Provenders in Cathedral Churches, * *Prebends*, I suppose. by which means the Pope had the First-Fruits of all the said Benefices. By this Complaint it should seem the Pope had yet got in but one Leg, that is, to have the First-Fruits of those Livings, to which he himself collated: A pretty piece of Simony.

In the 50th Year of the same King, the Commons renew their Complaint again, and amongst many Grievances from the Court of Rome there complain'd of, one is, That the Pope's Collector that Year (a thing never before done) had taken the First-Fruits of every Benefice, whereof he made provision or collation, whereas he was used to take First-Fruits only of Benefices vacant in the Court of Rome.

Anno 1376.
Rot. Parl.
n. 100. &
6 H. 4. nu. 21.
6 R. 2. 50.
1 R. 2. nu. 66.
4 R. 2. nu. 44.

And 9 H. 4. Cap. 8. not in the print, there is a Statute expressly against payment of them upon the pain in the Statute of Provisors, which is a Premunire.

And if *Walsingham* says true, *Summus Pontifex* (*Anno 1316.*) *reservavit Camerae Hist. Wals. p. 108.* *primos fructus beneficiorum omnium in Anglia, per triennium vacantium.*

So that it is apparent, that in some cases First-Fruits were paid long before Boniface the 9th, or John the 22d; but perhaps the Pope before them had not made it an universal payment.

These were often complained of, as a great oppression upon the Clergy, as *Henricus Hostiensis*, who lived in the time of Pope Alexander the 4th, witnesseth; but

however upon the abolishing of the Pope's Usurpations here in *England*, the poor Clergy were not acquit of this Exaction, but the same was by the Statute of 26 H. 8. settled upon the then King, and his Successors.

The First-Fruits are not here in *England* rated at the full and utmost value of the Living they are to be paid for, but according to the valuation taken and made in the said 26th Year of King H. 8. and now used in the First-Fruits-Office.

1 El. cap. 4.

And these First-Fruits are by a Statute made 1 Eliz. *not to be paid all at once; but one quarter of them is to be paid at the end of six months from the time of the Induction, Collation, &c. another fourth part at the end of twelve months, another fourth part at the end of eighteen months, and the last quarter part thereof at the end of two Years.*

1 El. cap. 4.

And by a Statute made 1 Eliz. all Vicarages not exceeding ten Pounds, and all Parsonages not exceeding ten marks, according to the valuation in the First-Fruits-Office, are discharged from the payment of First-Fruits.

And if an Incumbent die, or be legally removed out of his Living without fraud, then after such death or removal, the remaining half yearly payments of the First-Fruits, which were not become due, are discharged by the said Statute of 1 Eliz.

St. 26 H. 8 c. 3.
When the First-Fruits are to be paid.

And by that Statute the Dean and Canons of *Windsor* are discharged of the payment of First-Fruits.

And

And by the Statute made in the 26th Year of H. 8. before-mentioned, It is Enacted, That every Arch-bishop, Bishop, Dean, Prebendary, Arch-deacon, Parson, Vicar, &c. before he have any actual or real possession or meddling with the Profits of his Living (this must be between Institution, Collation and Induction) must pay or compound for, and give security for the payment of his First-Fruits in the First-Fruits-Office: And that an Obligation taken for the same should be of the force of a Statute of the Staple, and that if any such presume to enter into his Living before such payment or security given, or composition made, he is to forfeit double the value.

But his Majesty and his Royal Predecessors have not been severe in this Case to take the Penalty, but upon failure their Officers of the Exchequer have sent out Process to the Sheriff, to put the negligent Parsons, Vicars, &c. in mind of this duty, and upon coming in and paying the charge of the Process, and paying or giving security for the First-Fruits, they are discharged.

But the Parsons, Vicars, &c. must be careful to pay in their half yearly payments, as the same become due, and take up their Bonds, or else new Process will issue to the increase of their charge.

Perhaps some may be so curious that they will desire to know, why Vicarages not exceeding ten Pounds should be freed of this Charge, and Parsonages of ten Marks should pay them: Now the reason of that was, that the Vicarages in time of

Why Vicarages are charged higher in the First Fruit Office than Parsonages.

Popery, and when the Valuation was taken, had a great Income by voluntary Offerings, which falling to little or nothing upon the dissolution of Monasteries, this favour was afforded them in their First-Fruits.

Tenths.

*It should seem
these were im-
posed by Boni-
face the 8th to
maintain his
Wars in Sicily.
Extravag.com.
l. 3. p. 269.
2 Inst. 628.*

Stat. 25 H. 8.

St. 26 H. 8. c. 3.

The next Charge Parsons and Vicars are subject to, are the Tenths, that is, a tenth part of the yearly value of all their Church Livings; this payment was first exacted from the Clergy by the Pope, about the twentieth Year of E. 1. and a valuation was then made by his Authority, of all Church Livings, at which rate the Pope was answered his Tenths, but he never had any Tenths of such Land as was given to the Church after that time. These payments (as appears by our Histories) the Pope of Rome sometimes granted to the Kings of England, when the Kings pleased them, or rather when they feared their Power; but upon the abolishing the Pope's Power, which was in the 25th Year of H. 8. these Tenths were given to the King the Year following by the aforesaid Statute of 26 H. 8. and to be paid at Christmas yearly, and the Bishop of the Diocese is to collect them, and they are to be paid according to the valuation taken the same Year, and now in the First-Fruits Office, and are not paid that Year the First-Fruits are paid, but are allowed out of them, because it is intended that the King has the whole Years Profit.

But immediately upon the Reformation many Clergy-Men scrupled and denied

to

to pay these Tenths to the King, being a Duty properly due to the Pope, and therefore the refusal or neglect to pay them to the King, being certified by the Bishop *that had the Collection of them, is made a cause of deprivation, not only of the Living for which they refused to pay their Tenths, but also of all their spiritual Preferments.* St. 26 H.8.c.3.

But by the Statute of 2 and 3 E. 6. *that severity was moderated; so that now the refusal or neglect to pay them, and so certified by the Bishop, makes only that Living void, for which the Tenths shall be so refused.* But his Majesty and his Royal Predecessors have rarely put the severity of this Law in execution, but make out process in the Exchequer to compel the payment; however since the Penalty is so great, every Clergy-Man ought to be very careful to avoid the danger. St. 2 & 3 E. 6. cap. 20.

An Apparator came to a Parson newly inducted, and told him he must pay his Tenths to such a Person, naming him, at such a day and place, four Miles off; and this was adjudged no good demand to make his Living void within the Statute, but such demand which will make a Living void within the Statute, must be positive by one that has power to demand and receive it.

More 541.
Dyer 116.
p. 69.
Cro. El. 244.

And note, That the Bishop's Certificate is not peremptory; but may be traversed, and the Party that demands the Tenths must be sufficiently Authorized. See Cro. Eliz. 80.

There

St. 27 H. 8. c. 8.
The remedy
where the Suc-
cessor pays
Tenths due by
his Predecessor.

There is a Provision made by an Act of Parliament in the 27th year of H. 8. for those Incumbents that shall be forced to pay the Tenths due in the time of their Predecessors, that they may levy the same upon any Goods they can find of their Predecessors upon the Church Living; and if they be not redeemed within twelve days after they shall be distrained, then the same shall be praised by two or three indifferent Persons to be sworn, and so many of them sold as will satisfy the Arrear with cost; and if no such Goods can be found, then the Successor to take his remedy against his Predecessor, his Executors or Administrators, or others to whom his Goods shall come, by Bill in Chancery, or in Action of Debt at Common Law.

Procurations.

Sir John Davies Rep. 1, 2, 3.

There is another charge to which the Parsons, Vicars, &c. are subject for their Church-Livings, which is called Procurations or Proxies; and these are Duties due and payable to the Arch-Deacons at the time of their Visitations, which are not paid by any certain Rule, but by some ancient Taxation; for anciently the Religious Houses and Clergy-Men at their own charge entertained the Bishops and Arch-Deacons in their Visitations, but at length their Attendants were so many, and their Trains so great, that the Clergy and Religious Houses were horribly oppressed with entertaining of them; to avoid which, the Clergy and Religious Houses came to this composition, every one to pay such a proportion to their Visitors to be freed from that great oppression; and therefore the Canonists define them

See more of this matter, Lindw. cap. ut singula Ecclesiastica. That by a Canon made by Steph. Langton about 1222. the Arch-Deacons were to bring but seven Horses in their trains, and to stay but one day, and to invite no body.

them to be, *Exhibitio sumptuum necessarium facta Prælati qui Dioceses peragrando Ecclesias subjectas visitant*, and this payment is continued to this day, not only of those Livings which are still enjoyed by the Clergy, but also of the Impropriations being saved by the Statute of 31 H. 8. and confirmed by the Statute of 34 H. 8. and remedy given for them with Costs, both in the Spiritual Court and at Common Law.

31 H. 8. cap. 13.

And note, that if there be a Parsonage and a Vicarage endowed, there is but one of them to pay Procurations, but which of them must pay, is to be directed by Custom or the Indowment, if extant.

Cap. Quoniam autem verb. una tantum.

Note likewise, that Donatives are not to pay Procurations, because they are not within the Visitation of the Ordinary; and so for free Chappels, for the same reason.

And if there be a Parsonage which has a Chappel depending on it, that is, where both are in the Parson's Cure, no Procurations are to be paid for the Chappel.

Cap. Quamvis lex naturæ.

Synodals is another charge upon the Parsons, Vicars, &c. and is likewise paid to the Arch-Deacon, not by any certain Rule, but by some ancient Taxation; so that some pay more, and some less.

Synodals.

I must confess I cannot find how this payment first became due, but by the name it should seem to be a Contribution to the Arch-Deacon's charge in the Synods, they * being anciently elected by the Deacons themselves as their Representative.

* St. Jerome in his Epistle to Evagrius, says Diaconi elegant de se quem industrium noverrint, & Archidiaconum vocant.

† But

† Dugdales
War 126. b.

† But it should seem, that the Arch-Deacons claim these Synodals for their *Easter-Visitation*: and the Bishops have laid some claim to them, but as my Author conceives, without any just reason, the Arch-Deacon and his Officers performing the Labour, and undergoing the Charge.

Since my first publishing of this Book, a learned and worthy Divine sent me a Book, written by a learned and ingenious Person, amongst other things concerning Synodals, whereby he expected I might receive some satisfaction concerning the Original and Growth of them, at whose Candle I should thankfully have lighted mine own, if it had given a clear light: But when I came to read the Book, I found the Author indeavoured to prove them one and the same with the Cathedraical Duty, whose reasons to that purpose I can by no means subscribe to.

Cap. Quoniam
autem verb.
onera Ecclesi-
astica.

First, because Mr. *Lindwood*, a very learned Civilian and Canonist, reckoning up the *onera Ecclesiastica*, tells us, *Quadam enim sunt quæ dicuntur Episcopalia, & inter hæc continentur Synodaicum, Cathedraicum, &c.* so that it appears he conceived them two several and distinct charges.

Causa 10. q. 3.
Quid vero &
placuit ut nul-
lus & Concil.
Braca. cap. 2.

Secondly, the *Cathedraicum* is by the Canons restrained not to exceed two Shillings, whereas anciently the Bishops had a third part of the Offerings, and in consideration thereof were to repair the Churches, they had this payment in consideration of the third part of the Offerings, and were acquitted of the repair of the Churches.

But

But I could never learn that the *Cathedraicum* was ever paid in *England*, and the reason may be, because the Churches in *England* have always been repaired by the Parishioners by custom. Now the *Cathedraicum* being limited to two Shillings, and finding upon inquiry, that the Synodals are not confined to any certain Sum, but for the most part more than two Shillings; it is very improbable that they are one and the same.

Thirdly, the *Cathedraicum* is annexed to the Bishop's Chair, and in recompence of a Duty not transferred to any other; but for ought I could ever learn the Synodals have been always paid to the Arch-Deacons; and therefore for these reasons I take them for several and distinct Duties, as *Lindwood* seems to take them.

The same Author gives an Account of some difference that has been moved between the Arch-Deacons and the Clergy, whether Procurations are due to the Arch-Deacons when the Bishop visits: In which case the same Author has given his Verdict clearly for the Arch-Deacons, and grounded his Opinion upon Reason, Custom and Authority.

First, his chief and only reason is, because the Arch-Deacon pays his Tenths as well for that Year the Bishop visits, as for the other two; and therefore he concludes it very reasonable he should have that for which he pays Tenths.

But I conceive there is a great mistake in this Argument, for I am not satisfied
the

the Arch-Deacons pay any Tenth for their Procurations, but for the Corps annex to their Arch-Deaconries and their Jurisdiction; for it were against reason to charge them to pay Tenth for that they eat and drink in their Visitations; and the Tenth ought to be of the clear Profit; but where the Procurations are paid in Money it should seem Tenth are due.

Vide extra.
com. de deci-
mis 296.

But admitting upon the valuation in the 26 H. 8. the Procurations were valued (for in that of 20 E. 1. they could not be valued, not being then reduced into Money, nor of long after) then the Argument runs no farther, than that, because the Arch-Deacon pays a Tenth part against reason, therefore the Clergy must pay the whole.

But the reason against the Arch-Deacons in my judgment is much stronger. I shall not take upon me to examine whether their Jurisdiction be ordinary or delegated? I will admit Custom has made it in some measure ordinary, though much might be said against it; I will let that point pass unquestioned, but from the beginning it was not so. But let that be as it will, it is clear there was no Jurisdiction annex to Arch-Deaconries originally; the first step was over the Deacons, as shall be shewed hereafter: It is without all doubt, that Originally all Jurisdiction over the Clergy was in the Bishops, and they in their own Persons visited the Churches within their Diocesses, for the first 600 Year, after Christ.

But

But in the Fourth Council of Toledo, 4 Concil. To-
 which was held about the 630th Year after letan. cap. 35.
 Christ's Birth under *Honorius*. 1. It was de- 2 Concil. Bra-
 creed, *Episcopum per cunctas Diocæses Paro-* ca. cap. 1.
chiasque suas per singulos annos ire oportet;
 what to do? not only to eat and drink,
 but *ut exquirat quo unaqueque basilica in re-*
paratione sui indigeat. But *si ipse aut lan-*
guore aut aliis occupationibus implicatus id ex-
plere nequiverit, Presbyteros probabiles aut Di-
acanos mittat, qui & redditus Basilicarum &
reparationes & Ministrantium vitam inqui-
rant.

This is the first Commission that I can
 find for Bishops to make Substitutes to in-
 quire, but the Jurisdiction still reserved to
 the Bishop to admonish, examine and pu-
 nish; but here is no news of Arch-Deacons
 as yet in power.

The first news I hear of any thing tend- Distinct. 25.
 ing to any *Jurisdictionem* was over the perfectis.
 Deacons; for *Gratian* tells us, *Archidia-*
conus, Subdiaconis & Levitis ad quem ista
pertinet Ministeria. Et ad ipsum nunciat Epis-
copum excessus Diaconorum: So that it seems
 the petit Jurisdiction the Arch-Deacons
 begun with, was to inspect the Behaviour
 of their Brother Deacons, and to give the
 Bishop an account of their Miscarriages in
 the nature of a Monitor only.

The next news I hear of them is a com- Distinct. 94.
 plaint against them, *Quod in plerisque locis* dictum est.
ipsi super Presbyteros quandam exercent do-
minationem: but staid not there, but *ab eis*
censum

cenſum exigunt, (which the Biſhops could not do) whereupon it is commanded, *quod ſint contenti regularibus diſciplinis, & teneant propriam menſuram quam ab Epiſcopis eis injungitur; hanc per parochias ſuas exercere ſtudeant, nihil per cupiditatem & avaritiam præſumentes.* Here it appears that they had gained ſome employment under the Biſhop over ſome certain Pariſhes, but with a limited Jurisdiction; they muſt keep their Meaſures, muſt not exceed their Bounds.

Hob. 16.

Ergo dicuntur
oculi Epiſcopi.

By this it appears that the Arch-Deacons are meerly Subſtitutes to the Biſhop, and what Authority they have is derived from him, his chief Office being to viſit and inquire, & *Epifcopo nuntiare*; and therefore the Biſhop takes what Cauſes he pleaſes to his own Cognizance, and leaves ſome petit buſineſs to the determination of the Arch-Deacon. This being granted, which cannot be juſtly denied, it is againſt all the reaſon in the World, that the Biſhop by eaſing of himſelf by appointing a Deputy Vicar or Vicegerent ſhould double the charge upon his Clergy.

As for the Cuſtom alledged for this Duty, before I give an Answer to it, it will be neceſſary to examine how the Canon Law ſtands in the point.

Cap. ut ſingula
Eccleſiaſtica.

And by our own Provincial Canons I find it is eſpecially provided, that the Arch-Deacons ſhould receive no Procurations, *niſi illo die quo perſonaliter viſitant Eccleſiam procurantem*; and it goes farther, *nec redemptionem pro viſitatione præſumant.* What can

be more clear? and what can this redemption mean, but Procurations in Money, as is now used?

And the Gloss, to make still more clear, Verbo visitatione. tells you, *forſan quia Episcopus eodem Anno visitavit & ſuſpēdebat Jurisdictionem Archidiaconi, & ſic Archidiaconus vult ab eis aliquid loco procurationis exigere quod non licet ut hic, ubi non visitavit.*

And by another Canon made by John Stratford Archbishop of Canterbury and his Clergy, about the Year 1345. it is forbidden, *Ne quis procurationem ratione visitationis solvendam ab aliqua præſumat recipere Ecclesia, niſi visitationis officium diligenter eidem impenderit, ſcrutatis personaliter, & inſpectis per ipſum cum effectu quæ fuerint indaganda. Vide 4 Concil. Later. ſub Innocent. 3. ca. 33.* to the ſame purpoſe.

Cap. Quamvis
lex naturæ.

By this Canon likewiſe there is no Procurations to be paid without perſonal Viſitation. But for the better underſtanding of this Canon I muſt obſerve to the Reader that there are two other ſorts of Procurations, the one by Pact or Covenant, the other by Cuſtom, that are no ways related to Viſitations, and therefore the Canon well diſtinguiſhes, *ratione visitationis.*

Ibidem verò.
ratione visitationis.

And after that Canon has taken care for moderating the exceſſive Charge of the Viſitors in their Viſitations, it leaves it to the choiſe of the viſited. *An in pecunia quantitates ſolitæ, vel in victualibus viſitantes eoſdem voluerint procurare, optionem reſervamus.*

The Parsons Counsellor: Part II.

And Mr. *Lindwood* tells us, in those days it was a common use in *England*, that the Arch-Deacon received in Money, *nomine procurationis* seven Shillings and six Pence, that is, eighteen Pence for himself and his Horse, and six Shillings for his six Attendants and their Horses.

There is by the same Canon provision made, that where there is a Church and a Chappel depending of it, which is not presentable, but within the Charge and Cure of the Parson, that in that Case there shall be but one Procuration for both, and that he that shall take more, shall *ipso facto* be suspended *ab officio & beneficio*, till he has paid double the Sum received to the Cathedral Church of that Diocess.

Lastly, this Canon concludes with the Duty of the Arch-Deacon and other Ordinaries in their Visitations, that *tam in Ecclesiis quam ornamentis eorum, cæmeteriorum clausuris & mansorum domibus reperientes defectus, iis sub pecuniariis penis præcipiunt reparare, &c.*

So it appears by these Canons, that there are no Procurations due to the Arch-Deacons, unless they visit *personaliter*; and if it be demanded, why in Person, and why *Ecclesiasticum*? the close of this Canon tells you.

Now you shall hear what *Othobon*, the Pope's Legate, in a National Synod held in *St. Pauls, London*, in *May 1268*. says to this matter, *Cum autem* (says he) *ratione visitationis procuratio debeatur, si quid exequatur*

See *Causa 10.*
q. 1. Relata to
the same pur-
pose.

vel recipiatur hujusmodi ratione cessante, jam male recepti & indebiti nomen subiit. Cum igitur intellexerimus quod plerique praelati procuraciones a subditis exigunt, licet visitationis officium non impendant; nos tam Ecclesiarum indemnitati quam * praelatorum saluti consul- * Nota.
tius providentes, districtius inhibemus, ne quis eorum procuracionem, que ratione visitationis debetur, ab Ecclesia quacunque recipiat, nisi cum eidem visitationis officium impendit; qui vero receperit, donec restituerit, ab ingressu Ecclesie sit suspensus.

So that it appears by these Canons, the Arch-Deacon, when the Bishop visits, ought not to have Procurations, but is expressly forbid to exact them. Now how far a Custom shall prevail against a Canon (I mean such Custom as the Ecclesiastical Courts allow of forty Years continuance) belongs to the determination of the Canonists. And the Author tells us, Page 25. from them, that that Custom is said to be rationabilis, and by consequence inviolabilis, that is, binding, *Quæ nec divino juri contradicit, nec obviat Canonicis institutis.*

Concil. Later.
4. sub Innocent. 3. Can. 33.
Accords.
Gregory's Decretals, cap. ad nostram audientiam de consuetudine causa 10. q. 1. —
relata.

I could say much more to this purpose, but it belongs to the Canonists, to whom I leave it.

But if the Author intend such Custom is allowable at Common Law, when he says Canons cannot be of such force as to annihilate and overthrow National Laws and Customs, I must grant he is therein very right.

But in this Case there can be no such Custom; for every Custom allowable at

Vas electionis
Extravagan.
li. 5. de censu-
bus, &c.

the Common Law must have its Commencement before the first Year of R. 1. which was *Anno Dom.* 1189. but the Decree of Pope *Benedict.* XII. which first gave way to commuting Procurations into Money *Volentibus*, was about the Year 1337. and Money payments in lieu thereof were not settled here in *England* of long time after; and therefore they cannot be claimed by any Custom or Prescription at Common Law.

For the Case of *Proxies* in *Ireland*, which he vouches forth of Sir *John Davies* Irish Reports, I conceive makes nothing at all to this question; for it is not at all moved in that Case, whether there were a double *Proxie* due, the one to the Bishop when he visits, and another to the Arch-Deacon that sits still: But I presume the Author makes use of that Case to prove, that Procurations may be due *ratione visitationis*, when there is no Visitation: And I will agree they may by Act of Parliament; and in that Case, there are two Acts of Parliament for them.

Co. 4.

But Sir *William Capel's* Case, vouched in *Lutterel's* Case, may be conceived to make something to this purpose, where the Case shortly is, That one held his Land *inter alia* by the Rent of five Shillings *pro wardo castri*, and upon Avowry for this Rent, the Tenant pleaded that the Castle was down, and therefore no Rent due, and upon Demurrer adjudged against the Tenant; and very great reason, for the Rent was reserved in respect of the Land, and not in respect

respect of the Castle, for the reservation of the Rent is *Reddendum inde*, that is, for the Land five Shillings *annuatim pro wardo castri*; and the saying the Castle is down does not answer the *Debet*: But if the Land for which the Duty arises be evicted by a more ancient Title, the Rent is gone; so that this Case being rightly understood, makes against the Arch-Deacons rather than for them; for in their Case the annual Payment is paid for Procurations. Procurations are due, *ratione visitationis*; then when the Bishop that has the ancients Right to visit, inhibits his Deputy, and does the work himself, to whom do the wages belong?

Decret. Greg.
li. 2. cap. 16.
cum ex officii.

And note, That by the Canon Law no Man may prescribe to be free from Procurations *ratione visitationis*.

Here I could willingly end my Discourse, for I doubt I have said enough to displease some; but no good Man ought, nor I hope will take any offence at what has been said, or at what I am about to say; and therefore I shall add a word or two concerning the Arch-Deacons and their Visitations.

It appears by what has been said, that for the first six hundred Years after Christ, the Bishops in their own Persons visited *cunctas dioceses parochiasque suas singulis annis*, and they had seven Deacons in every City, that is, Diocefs, to assist them. After that they had Authority in case of Sicknefs, or other publick Concerns, to delegate Priests or Deacons to assist them;

Concil. Tolentan. 4. cap. 35.
& Fraca. ca. 7.

Dist. 94.
dictum est.

Cum Aposto-
lus Sub. Alex.
3. 1179. ca. 4.

Ut singula Ec-
clesiastica.

Cap. cum Apo-
stolus.

3 Council of
Lat, 1176. sub
Alex. 3. cap. 4.

Quamvis lex
naturalis.

and thereupon, as should seem, they can-
tonized their great Diocesses into Arch-
Deaconries, and gave them Commissions
to visit and inquire, and to give them an
account of all at the end of their Visitati-
ons; as is before related; and the Bishops
reserved the third Year to themselves to
visit their Churches, and thereby to inform
themselves how the Arch-Deacons, their
Substitutes, performed their Duties, how
they domineered over the Clergy, and
were reduced to their true measures. You
have heard after upon complaint of the
oppression, they and others used in their
Visitations by their excessive numbers of
Attendants, in one of the Councils of *La-
teran* the number of their Attendants were
limited, and by Canons of our own sever-
al Restrictions have been made against the
Exorbitances of Visitors.

By one Canon in the time of Archbi-
shop *Langton*, they are commanded that in
their Visitations their Attendants shall not
exceed the number limited in the general
Council of *Lateran* (whereby an Archbi-
shop in his Visitation is allowed forty or fi-
ty Men and Horses, a Bishop twenty or
thirty, Arch-Deacons five or seven, an Arch-
Priest two.) And further restrained the
Visitors, that they should invite no Body to
their Visitation-entertainments.

But this did not do the work intended
in easing the Clergy; therefore after in
the time of *Stratford* Archbishop, by the
Canon before remembred it is farther
provided, that if any *plures visitare voluerit*

Eccle

*Ecclesias una die, procuratione unica in victu-
alibus vel pecunia, ad quam omnes & singulas
sic die unico visitatas proportionabiliter faciat
contribuere; prout tradunt Canones, sit conten-
tus. Et si nocte præcedente visitationem in
quavis Ecclesia faciendam ad sumptus Rectoris
seu Vicarii visitandi, seu die visitationis in
grandio steterit, cum eisdem veram æstimationem
sumptuum hujusmodi in procuratione, si
tam in pecunia visitans licite duxerit exigendam,
computare, seu allocare, vel pro ea in toto stu-
deat compensare. Ita quod nec ultra sumptus
hujusmodi solidam procurationem in pecunia,
nec amplius quam deductis eisdem sumptibus de
procuracione in pecunia exsolvenda supererit,
presumat recipere vel exigere quovismodo. Si
quis autem aliter fecerit, donec indebite recepta
restituerit, ab ingressu Ecclesiæ noverit se sus-
pensum.*

And by the before mentioned Decree of **Naturalis dis-**
Othobon it is ordered, that Bishops and o- **positionis.**
ther inferiour Officers in their Visitations,
in *superflua comitiva seu evictionum numero,*
vel *alias in expensis gravare subditos non præ-*
sumant ultra quantitatem & numerum determi-
natum in constitutione Innocentii Papæ quarti,
se, &c.

But Pope **Benedict** the XII. good Man, **Vas Electionis**
made an Edict or Constitution decretal, **ubi supra.**
whereby he setled what every Clergy-man, **Extravag. l. 5.**
&c. should pay by way of Commutation **de censibus.**
in lieu of their Procurations, and this was
about the Year 1337. But the good Pope
left in the Election of the visited, whether
they would pay their Procurations in Mo-
ney or Victuals; but it was long after, as

should seem, before this Decree was generally received in *England*; (which makes me believe the Arch-Deacons were more moderate here than elsewhere.) For when *Lindwood* published his Provincial Canons, which was about the Year 1423. it was not generally received in *England*; which was almost an hundred Years after. But the certain time that Procurations here in *England* were turned into Rent, I cannot find out: But the effect of this innovation was, that when Procurations were reduced to an annual Rent, the Visitations were degenerated into an *Audit* of Receipts, and called a Visitation where the Parson draws up a thing called a Presentment containing (*omnia bene*) which by the Church-wardens is delivered to the Visitor or his Deputy, and Procurations paid, and the Visitation is ended; when for the most part nothing is well, or as it should be: The Churches kept like Swine-styes (I beg pardon for the comparison, I wish it were not too true) the Floors broken up, the Windows broken down, the Church and Buildings belonging to the Parsonage and Vicarage Houses dilapidated, the Parson Non resident, Pews in the Church built so high and disorderly, that the Behaviour of the People therein cannot be observed, Books and Ornaments of the Church wanting or imbezeled; and it is not likely the Parson and Church-wardens should present these things, when themselves are commonly most in fault; and besides the Churches, the Church-yards how are they used, their Fences neglected,

lected, Swine rooting in them, Muck-heaps thrown in them, and prophane gaming and other Debaucheries used in them, shame to see or hear of?

There was complaint in the Council of *Toledo*, *Quod quidam Episcopi negligebant suas parochias visitare singulis annis ad prædicandum & ad confirmandos pueros, procuraciones tamen exigebant, ac si Ecclesias visitarent: quod ex avaritia & negligentia procedat.* There it was decreed in that Council, *ut hoc de cætero non faciant Episcopi, sed solícite & diligenter greges visitent, cupiditatem vitantes, & negligentiam dimittentes.* Causa 10. q. 1. Relata est.

Certainly if there was Cause of such Complaint in those days, there is much more now.

I do not speak this, as though it were now a Duty incumbent upon the Reverend Bishops to visit in person *Ecclesiastim*; their Age and great Employments, and the Canon gives leave to do it by their Substitutes the Arch-Deacons: But if their Lordships would be pleased to enjoin their Arch-Deacons to visit every third Year *Ecclesiastim*, when their Lordships hold their triennial Visitations, and give their Lordships a personal account how they found all things, it would work a great Reformation in the Miscarriages before-mentioned; and the Arch Deacons would certainly be ready to obey such a Command, *Nemagis videantur lucris pecuniariis inhiare, quam Ecclesiarum velle conservare statum, & salutem animarum querere*; and then it were reason they should have their Procurations that Year also,

By the Canons of King James they are to visit every year. Can. 86.

Orthobon. cap. Naturalis dispositionit.

The

See Selden's
Hist. of Tithes,
219, 222, &
224.

The same worthy Author that has brought me into this Discourse, tells us of another charge by the name of *Pentecostals* or *Whitsunday Farthings*; these are but a Charge upon some particular Churches, where by Custom they have been paid, and seem to be of the nature of Offerings: But I have never met with any thing more of them, than what I have received from that learned Author.

4 Concil. To-
let. c. 37.

Lastly, I will conclude with an accidental, but a grateful Charge, which is, That if the Founder or Benefactor to a Church, or their Posterity, becomes necessitous, they are from the same Church to receive Relief. *Si enim omnibus aliis* (says the Canon) *necessitatem sustinentibus pro solo religionis intuitu in usum res Ecclesie largiuntur, quanto magis consulendum est, quibus retributio debetur?*

All these Charges and more the secular Clergy undergoes, which takes away a considerable part of their Revenues.

C H A P. XVI.

How far Prescription will prevail in the manner of Tything, and in what Cases the Parson, Vicar, &c. shall be bound by a Modus decimandi.

THE Canonists, and those that are of *The force of a* Opinion that Tythes are due *jure di-* *Modus deci-*
vino, decry all Customs and Prescriptions *mandi in Ty-*
that either diminish the tenth part, or ac- *thing.*
quit the whole; for in truth, no Custom or *Lindwood. ca.*
Prescription can be good which is positive- *Quoniam*
ly against the Law of God. *propter verbo*
redemptio-
nem.

And that is the reason why it is fre- *Co. Select. Ca-*
quently said in our Law-Books, that the *ses, 46.*
Ecclesiastical Courts will not allow a *Mo-* *Dyer 79. p.49.*
du decimandi.

But the Common Lawyers allow Tythes *Common Law*
to be due *Jure Divino secundum quid*, that *and Canon dif-*
is, *quoad sustentationem cleri*, but not *quoad* *fer concerning*
decimam aut aliquam aliam certam partem; *Customs, &c.*
and therefore they allow of a manner of
Tything which diminisheth the *Quantum*,
or a Custom of not Tything for this or
that particular thing, so there be a suffici-
ent Maintenance for the Clergy besides:
and of the same Opinion are some of the
most eminent School Men. And in this, *Tho. Aq. Sum.*
as in all other things where the Common *2. 2^a. q. 87.*
Law, and Canon, or Ecclesiastical Laws *art. 1.*
differ, the Common Law is to be pre-
ferred; for no Canons are of force in *2 Inst. 652;*
England, which are contrary or repugnant
to

St. 25. H. 8.
Cap. 19. Fine.

1 Inst. 344. a.

*The difference
between Custom
and Prescripti-
on.*

*The Common
Law vindica-
ted.*

Lindwood c.
*Quoniam prop-
ter verb. Re-
demptionem.*

8 E. 4. 13. b.
&c.

Seld. Hist. De-
cim. 408.

to the Laws, Statutes and Customs of this Realm, or to the damage or hurt of the King's Prerogative Royal; but all other Canons Provincial still remain in force, and are confirmed by a Statute made in the 25th Year of H. 8. which Statute is declaratory of the Common Law. Co. 2. Inst. 658.

The difference between Custom and Prescription I have shewed before in the thirteenth Chapter.

But before I proceed upon this Subject, I must beg leave of the Reader to say something more in vindication of the Common Law, which in this point I conceive does not differ materially from the Ecclesiastical and Civil Law; for if I do not very much mistake the Canonists and Civilians they do at this day allow of real Compositions in discharge of Tythes, that is, where the Parson, Patron and Ordinary do by Deed agree to accept of a certain Sum of Money yearly, or so much Land or other profit in discharge of the Tythes growing and arising upon such Lands as they agree for. Now what is this but a *Modus decimandi*? and a Prescription to maintain this *Modus*, is no more than a supply to prove a real composition, which was made beyond all memory and lost; and it were against all justice and reason, that if a Man should be plundered of, or lose his Deeds, that he should thereby lose his Estate. And it must necessarily be intended, that every *Modus decimandi* that has continued time out of mind, must have a

rea-

reasonable and legal commencement, and must be intended that it began by a real composition.

A Rent-charge cannot be created but by Deed, and yet it may be claimed by Prescription, supposing a Deed preceded, the like Law is of all Commons, &c.

Sir Thomas Ridley, a Learned Civilian, P. 181.

in his view of the Civil and Ecclesiastical Laws, inveighs against Prohibitions, and the Common Law in case *de modo decimandi*; and endeavours to insinuate to the Reader, that the Spiritual Courts allow Prescriptions *de modo decimandi*, and that the Common Lawyers do the Spiritual

Lindwood c. p.

Courts great wrong to affirm the contrary. But he himself in the next precedent Section tells the Reader, that a Prescription to pay less than a full tenth part, is both against the Canon Law, and against the Law of God it self. Now in every Prescription *de modo decimandi*, it is to be intended the rate Tythe was the full value of the Tythe at the time of the Original Composition; for it cannot be presumed that the Bishop, Patron and Ordinary, would make a composition to the prejudice of the Church; and if the rate Tythe do not now reach the value, it is to be intended that either the Tythes are improved, or else that Money is now become of less value, which makes the present Inequality.

Quoniam propter verbo redemptionem. Consuetudo nec prescriptio juvat Laicos quoad decimam prescribendum vel retinendum. cap. Quoniam ut audivimus verb. consuetudine locorum quod laici minus solvant quam decimam, non potest consuetudine introducti, quia esset contra jus divinum.

Co. 13. 152.

Put the case then, that in the time of H. I. (for the purpose) the Lord of the Manor of Dale made a real composition with the Parson

Parson

Parson of D. that he and his Heirs for ever, then after would pay to the Parson and his Successors, five Pounds yearly, for the Tythes of his Demesns; and this composition was confirmed by the Patron and Bishop as it ought, and five Pounds was the full value of the Tythes at that time. I think it will not be denied me but this was a good real composition, and that if afterwards the Tythes had become of less yearly value, the Lord of the Manor had been bound by the composition to pay the five Pound *per annum*. Then suppose on the other hand, that the Lord of the Manor after this composition being thereby encouraged, made great Improvement of his Demesns, by which the Tythes are become of much greater yearly value, or that Money by the discovery of the *West-Indies* (as the truth is) be become of less value: Is there not then the same reason to bind the Parson as to bind the Lord in the other case? which being granted, as in all Justice and Reason it must, and the Lord having no other Evidence to make good his bargain but his composition, and that in the late Wars was plundered, or his House by accident burnt, mislaid or imbezeled; shall he therefore lose his composition which he must now be forced to claim by Prescription (his composition being lost) because the Tythes are of greater yearly value than five Pound, as the Civilians would have him, or shall he be admitted to maintain his Right by the Common Law, I appeal to the judicious and indiffe-

rent

rent Reader which is more just? Now the Judges of the Common Law, well knowing what the Judges of the Ecclesiastical Courts will do in this Case, and likewise that at this day there is no rate Tythe can come near the true value of the Tythe Wheat about the time these Compositions were made, not being perhaps above twelve Pence or two Shillings the Quarter, and now for the most part twenty times as much (not because Wheat is of greater value than it was, but because Money is of less) they do in this case frequently grant Prohibitions to try whether there be such a Custom or no; and if they find there is no such Custom, they send the Cause back by Consultation to the Ecclesiastical Court, to be there determined; but if they find there be such a Custom, they will not trust the Ecclesiastical Judge any more with it, but leave the Party to take his remedy for the *Modus* in the Ecclesiastical Court. And for the very same reason Prohibitions are granted upon real Compositions. And by the Ecclesiastical Law Tythes are due of Minerals, Turfs, fishing in the Sea, &c. which the Common Law denies, and therefore if Suits be in the Ecclesiastical Courts for any of these things which are due by the Spiritual, but not by the Common Law, the Judges of the Common Law do grant Prohibitions to stay their Proceedings.

And St. German in the *Doctor and Student* Lib. 2. cap. 55. puts this Case, That if it were ordained for a Law, that all payments of Tythes from thence-

thenceforth should cease, and that every Curate should have a certain portion of Land assigned to him, or a Rent or Annuity which should be sufficient for his maintainance and those that served under him, or that every Householder should give a certain Sum to that use, that this were a good Law, and grounded his Opinion upon this saying of Doctor Gerson, a great Doctor in Divinity, *Solutio decimarum sacerdotibus est de Jure Divino quatenus inde sustentetur; sed quoad tam hanc vel illam assignare, aut alios in alios redditus commutare positivi juris existet.*

Selden de Decimis, 164, 177, 188, 194. & Prefat. 21.

Prescriptions are confirmed by Parliament.

And this commuting Tythes into Annual Salleries is frequently practised in the Protestant Churches beyond Sea, as I have been informed.

And these Prescriptions *de modo decimandi* are not only allowed by the ancient Common Laws of this Realm, but confirmed by Act of Parliament.

St. 2 E. 6. c. 13.

For by the Statute of 2 E. 6. It is enacted, That no Person shall be sued or otherwise compelled to yield, give or pay any manner of Tythes, for any Manors, Lands, Tenements, &c. which by the Laws and Statutes of this Realm; or by any Privilege or Prescription are not chargeable with the payment of any such Tythes, or that be discharged by any composition real.

And having said thus much in vindication of the Common Law, I shall proceed to shew what Prescriptions and Customs, *de modo decimandi vel de non decimando* are good and allowed at Common Law.

First,

First, no Lay man can prescribe in *non decimando*, that is, to be discharged absolutely of the payment of Tythes, and to pay nothing in lieu thereof, unless he begin his Prescription in a Religious or Ecclesiastical Person, and derive a Title to it by Act of Parliament.

But all Spiritual and Religious Persons, as Bishops, Abbots, Priors, Deans, Prebends, Parsons, Vicars, &c. may prescribe in *non decimando*, and their Farmers may make use of such Prescriptions to free themselves from the payment of Tythes.

And hence it is, that the Parson or Vicar of one Parish, that hath part of his Glebe lying in another Parish, may Prescribe in *non decimando* for it, that is, as hath been said, to be free from the payment of any manner of Tythe for it.

But Churchwardens who have Land belonging to their Churches cannot prescribe in *non decimando*, because they are neither Religious nor Spiritual Persons.

A Parish or particular Town cannot prescribe in *non decimando*. *March. Rep. 26.*

It hath been held that a Bishop may prescribe that he and his Tenants for Life, Years and Will, and his Copyholders have been freed from the payment of Tythes; the reason alledged is, because it might commence by a real composition for the whole Manor. And in all Cases where a Spiritual Person prescribes in *non decimando* his Tenants and Farmers shall take the benefit thereof.

Who may not prescribe in non decimando. Seld. Hist. decim. 409. Rolls 1. 653.

Who may prescribe in non decimando. Winch. 65. Brownl. 1. 37. Co. 2. Evesque Winchester's Case. Rolls 1. 653. H. 3. 5. Rolls 1. 653. H. 6.

Churchwardens not.

Rolls 1. 653. H. 7. A Clergy Man may prescribe for himself and Tenants.

Rolls 1. 653. H. 4. C. 2. 45.

X

But

St. 27 H. 8.

c. 28.

Rolls 1. 654.

J. 1. contra.

Hob. 309.

But if any of the Abbies, Priors, &c. that came to the Crown by the Statute of 27 H. 8. were discharged of the payment of Tythes by Prescription *de non decimando*, yet the Patentees of these Lands shall not have the benefit of such Prescriptions, but shall pay Tythes.

Rolls 1. 655. l. 2

Patentee del

Roy.

Hetley 52. 60.

Cro. Car. 94.

dubitarur.

Brownl. 1. 31. 2.

contra.

Cro. Car. 94.

Dubitarur.

Ideo quære.

vid. Selden de

Decimis.

Roll 2. 655.

Hardres 315.

Neither can the Kings Patentee be freed from the payment of Tythes of those Lands which the King whilst he had them in his own hand, prescribed to be freed from the payment of Tythes, because it is a personal discharge in the King, for the question arising upon Lands disafforested, there might be several reasons why he paid no Tythes: first, because the Grounds were depastured with Beasts *feræ naturæ* for which no Tythes were due, or for that the King was not bound by the Decretal Epistle of Pope Innocent the Third, who settled the Parochial Right of Tythes, or by reason the King being a mixt Person, might prescribe in *non decimando*. But if the King prescribe in *non decimando* for Lands, and grants them over, the Patentee shall not by such Prescription be discharged, nor shall the King be discharged if the same Lands come to him again.

But the Kings Patentees of those Abbey Lands that came to the Crown by the Statute of 31 H. 8. may take advantage of a Prescription *de non decimando* in the Abbot, Prior, or other Religious Person by the force of that Statute, and the enjoyment of the Lands since the dissolution freed from the payment of Tythes during Me-

memory

mory, is a good Proof *a Posteriore*, that the Abbots, Priors, &c. held the same discharged from the payment of Tythes.

The Inhabitants of a County, Hundred or Country, as the Wilds of Kent and Sussex may prescribe not to pay Tythes of Wood, Milk, or any other particular thing, so there be a competent Livelyhood for the Clergy besides.

A Country may prescribe in non decimando. Lib. Intr. tit. Prohibit. Co. 2. 44. b. Doct. & Stud. l. 2. c. 55. f.

165, 167. b. 174. b. Roll. 1. 653. H. 10, 11, 12, 13. Hundred may prescribe in non Decim. for it is the Custom of the County which is the best Law that ever was. March rep. 25.

But every Lay-Man may prescribe *de modo decimandi*, that is, that such a Man being Lord of such a Mannor, and all those whose Estate he hath in the said Mannor, have from the time whereof the Memory of Man is not to the contrary, had and enjoyed to his and their own uses all the Tythes arising, &c. within the said Mannor paying so much yearly to the Parson of D.

Who may prescribe de modo decimandi. Co. 2. 44. a. b. Cro. El. 599, 758, 784.

And a Lord of a Manor may prescribe for himself, and his Copyholders, for they are part of the Demesns to the Mannor; or the Copyholder may prescribe in the name of his Lord.

Cro. El. 784. Noy 132.

If a *Modus decimandi* be to pay two things, two shillings for a Park, and a Shoulder of every Buck kill'd in the Park, and all the year die or are killed up, yet notwithstanding the Prescription holds good for the two shillings.

Hob. 40. 41. A Modus to pay two things, and one fails.

But every Prescription and *Modus* must have a Continuance, for it cannot be good one time; and asleep at another, neither can a wilful denial destroy a *Modus decimandi*.

Hob. 49. Prescriptions must not sleep.

Hob. 11.
Modus for
Houses.

mandi: And it is taken for a Rule in Dr. *Leyfield* and *Tisdal's* Case, that where no Tythes are regularly and legally due, as for a House, &c. there can be no *Modus decimandi* alledged.

Co. 11. 162.

Hob. 11.

Quære.

Rolls 1. 140.

b. 5.

Hob. 107.

Rolls 1. 651 d.

16, 17, 18, 19.

Cro. El. 446.

Co. Select Ca-

ses, 45.

More 454.

And yet it hath been held, that a Tythe by Prescription may be paid for an House, because it might be due for the Land before the House was built. *Ideo quære.*

A *Modus* to pay Tythes without the view of the Parson is not good, because it conduces to fraud, and is now against an Act of Parliament.

So a *Modus* that because you have paid your Tythe of your Cows, you have been freed of the Tythes of Oxen, Steers, Heyfers, &c. is not good; that is, to pay your Tythes in kind of one thing, thereby to free another Tythe.

Noy 108.

But where Tythe is only due by Custom, as for Fish taken in the Sea, there less than a tenth part may be good.

5 Co. 117. a.

C. L. 212. b.

Cumberland's

Case, per Rol.

P. 13 Jac. B.R.

What Prescrip-

tions de modo

decimandi

are good.

2 Leo. 70.

And it hath been held a void Prescription to pay a Load of Hay yearly in discharge of all his Tythe Hay, that is, to pay a part in discharge of the whole.

So for a Parishioner to Prescribe that he &c. has time out of mind repaired the Church, and by reason thereof hath been discharged of the payment of Tythes, is no good Prescription, for the Parson not being bound to repair the Church has no recompence: But if it had been, that he had repaired the Chancel, and in consideration thereof had been freed of the payment of Tythes, that had been a good *modus, ratio patet.*

Rolls 1. 649. 1.

d. 8, 9.

It hath been held a good Prescription, that the Parishioner hath time out of mind paid the Tythe Wool of all the Sheep he has shorn, though never so lately bought in, and in consideration thereof hath been freed of the payment of the Tythe of those he had sold before *Shereday*. *Wool and Lamb.*
Rolls 1. 648.
c. 1. 649. d. 7.

It hath been held a good Prescription, to have paid the tenth Fleece or Pound of Wool, so there were any allowance for the odd Fleeces or odd weight. *Rolls 1. 648.*
c. 4.

It hath been adjudged a good *Modus* that in consideration the Parishioner hath shorn and wound the Wool, to be free of paying Tythes of the Neckings and Birlings without fraud. *Rolls 1. 649.*
d. 5.

It is a good Prescription, that the Parishioner hath time out of mind paid a half-penny for every Lamb sold before *May day*; but if the Parishioner sell his Lambs fraudulently a few days before *May-day*, on purpose to defraud the Parson, &c. it is no good discharge. *Rolls 1. 652.*
g. 1.

A Prescription to pay wool in kind, if kept till Clipping-day, but if sold before, to pay a half-penny a Fleece, as Mr. *Marsh* reports, was held no good Prescription, *tamen* *quare*. *Marsh. 79.*

It hath been held a good *Modus*, that in consideration that the Parishioner hath mowed, reaped and shockt the Corn, and paid his Tythe in the shock, that he hath been freed of the payment of any Tythes of the Rakings; byt as Sir *Edw. Coke* says, there needs *no Modus* as to Rakings without fraud. *For Corn.*
More 474.
Littel. Rep. 31.

Rolls i. 648.
b. 6.

To Prescribe to have paid the Tenth Sheaf or Shock as it falls out, is no good Prescription to free the Parishioner of any other Tythe, it being no more than is due.

Rolls i. 649.
d. 4.

A *Modus* that in consideration, that the Parishioner hath sowed, reapt, bound and set up the Corn one year to be free from the payment of Herbage the next year of the same Land, was held good, *Tamen quare.*

Rolls i. 650.
d. 11.

But it is no good consideration, that in consideration the Parishioner has plowed, sowed, mowed, cockt and set out the Tythes of part, that therefore he should be freed of paying Tythes of a small parcel left standing.

Wood.
Rolls i. 648.
b. 7.

A Man may prescribe to pay the Tenth Acre or Rood of Wood standing, and the Parson, &c. cut it himself, as is used in some parts of *Lincolnshire.*

Calves and
Milk

Rolls i. 648.
c. 2.

It hath been held a good *Modus* to pay one Calf at seven, and if under, a half-peny a piece, and if he sell any Calf to pay the tenth part of the price; and it hath been held a good *Modus* to pay Tythe Cheefe from *May-day* till *Michaelmas* to be discharged of the whole Tythe of the Cows; and no Tythe is due for Cheefe but by Custom, and the labour of milking and making into Cheefe is added, whereas nothing but the Tythe of milk is due by Law.

Rolls i. 651.
d. 19.
Cro. El. 609.
786.

Rolls i. 651.
d. 17.

But it is no good *Modus* to pay for every Milch-Cow two pence, and for every Calf one peny, in discharge of the Tythes of all other Cattel; but it is a good *Modus* for

Chap. 16. *De* Law of Tythes.

311

for the Calves and Milk only; so a *Modus* to pay a Tythe Calf in satisfaction of the Tythe of all manner of Cattle is not good. Rolls 1. 651. d. 18.

A *Modus* to pay thirty Eggs in *Lent* in satisfaction of all the Tythe of Eggs has been held a good *Modus*. Eggs. Rolls 1. 648. c. 3.

It is a good *Modus* that the Parson time out of mind hath had so much, or such a parcel of Meadow or Land in satisfaction and discharge of all the Tythes of Hay, &c. arising upon such Land. Land in lieu of Tythes. Rolls 1. 649. d. 16. Cro. El. 587. 8 E. 4. 14. a. Headlands, Barks, &c. and Hay. Rolls 650. d. 10. Noy contra 15

It is no good *Modus* to be free from the payment of Tythe Hay arising upon Hades, Barks, Greenslips, or Doals eaten by Beasts of the Plow, in regard the Parishioner hath sow'd, mown, reapt, shockt and prepared the Corn, &c. But the contray hath been held, *Ideo quare*.

But in consideration that the Parishioner hath made the Grass growing in such a Close, and then paid the Tythe of it, he hath been free of the payment of the Tythes of the Barks and Hades, has been held good. Hetly 147.

It is not a good *Modus* that the Parishioner having spent all his Hay upon the Beasts of the Plough, that therefore he should be free from payment of Tythe Hay. Rolls 1. 650. d. 13.

But a *Modus* that in consideration the Parishioner hath cut, dried and shockt the Corn, he hath been freed from the payment of Tythe Hay, has been held a good Prescription. Rolls 650. d. 13.

A *Modus* that the Parishioner hath time out of mind got Rushes and firewed the Church,

Noy 31.

Cro. El. 276.

Syderf. 258.

Rolls 1. 647.

b. 1, 2, 3, 4.

648. d. 1, 2.

649. d. 3, 4.

Herly 133.

Hob 250.

More 910.

Cro. El. 660.

2. Inst. 652.

Bees.

Rolls 1. 652.

d. 15.

Herbage.

Bulstr. 2. Price

vers. Mascā.

More 909.

Church, and in consideration thereof hath been discharged of the payment of Tythe-Hay, has been adjudged no good *Modus*; but if it had been to strew the Parsons Seat, or to deliver straw to the Parson to strew the Church, had been a good *Modus*.

But a *Modus* to pay to the Dean and Chapter, though Spiritual Persons and Lords of the Manor, is not a good discharge against the Parson.

And it hath been held a good *Modus*, that in consideration the Parishioner has made the Hay into Grass-cocks, that therefore he hath been discharged of the Tythe of the Aftermath; but Sir *Edward Coke* declares for Law, that there needs no *Modus* to be alledged, but that Aftermath is of itself freed from the payment of Tythes, and so I take it the Law is held at this day.

A *Modus* to pay the tenth part of all the Honey and Wax of Bees killed, has been held a good *Modus* for the Tythe of Bees.

But there have been some Opinions, that there is no Tythe due by the Law for Bees, because they are *feræ naturæ*. But nevertheless both by Custom and Canon they may be Tythable, and so they are in most places.

A Custom or Prescription to pay no Tythe for the Herbage of Beasts bred up for the Plow and Pail hath been allowed to be a good custom: but of this see more before in the fifth Chapter.

It is no good *Modus* that the Owner of the Land hath paid all his Tythe for his

Cattel there depastured, therefore to be free of the Tythe Herbage for Guest-Horſes.

Guest-Horſes.
Roll 1. 650. d.
14.

It hath been held that no Tythes ſhall be paid for the Fewel ſpent in the dwelling Houſes in the ſame Pariſh it grew, without alledging any *Modus* at all.

Fewel.
More 909.

But it ſhould ſeem that in this laſt Caſe there needs no *Modus* at all to be alledged, but that for the Fewel ſpent in the Owners Houſe in the ſame Pariſh, there is no Tythe due of common right. *Ideo quere.*

Cro. Car. 113.
Norton verſ.
Farmer. T. 4
Car. 1. C. B.

If a Man preſcribe to pay fix ſhillings and eight pence, for all the Tythes ariſing and happening in ſuch a Park, and the Park is diſparkt and turned to Tillage, the Preſcription is gone.

Parks.
Rolls 1. 651. e.
1 and 4.
Maſcal verſ.
Price. P. 13 Ja.
B.R. Hob. 39.
Hutton. 58.

But if in this caſe he had made his Preſcription, that in conſideration of fix ſhillings and eight pence yearly paid to the Parſon, &c. he had been freed of all the Tythes ariſing upon fix hundred Acres of Land, called D. Park, this had been a good Preſcription, and ſhould have freed the Park.

So if the Preſcription of a Park have been to pay fix ſhillings and eight pence, and a Shoulder of every Buck killed in the Park, in diſcharge of all Tythes ariſing within the ſame, in this caſe, though the Park be diſparked, and no Deer left, yet the *Modus* remains, and ſhall diſcharge the whole Tythe.

Rolls 1. 652.
e. 5:
More 909.
Boothby verſ.
Reynels.
M. 20 Ja. B.R.
M. 10 Jac. 10.
641. B. R.

And it has been held a good *Modus* to give a Buck and a Doe yearly to the Rector, &c. in diſcharge of all the Tythes ariſing

Hutton 57,
Noy 146.
Owen 34.
Noy 148.
More 909.

arising within the Park, although they be *feræ naturæ*; and it shall hold though the Park be disparked.

But if the *Modus* have been only for the Herbage of the Park, and if it be disparked and sown with Corn the *Modus* is gone.

*Modus for
Land.*
Hutton 58.

If a Parson, &c. have had an Acre or piece of Meadow Ground time out of mind, in discharge of all the Tythe Hay arising upon such a Farm, this shall only discharge the Hay upon the ancient Meadowing, and not the Hay of Ground converted from Pasture or Tillage to Meadowing.

Rolls 1. 651.
c. 1.
2 Inst. 490:

But if one have a *Modus* for all the Demesne of his Mannor, and erect a new Mill, this shall be comprehended within the *Modus* and shall not pay any Tythe.

Rolls 1. 651.
E. 2.

But if a Man have a *Modus* for all the Hay and Grass upon twenty Acres of Land, and converts the same to Tillage, or into a Hop-yard, he shall pay Tythes thereof: So it appears a great difference where the *Modus* goes to all manner of Tythes in general, and where to particular Tythes.

* Where a *Modus* to the Vicar shall discharge against the Parson, and e converso.
More 907.
Cokes Select Cases 37.

* Where a *Modus* is Alledged to pay a certain Sum to the Vicar in discharge of any Tythes due to the Parson, this being a dispute of the Right between two Clergy-Men, ought to be determined in the Ecclesiastical Court, but it seems to be a good *Modus* as to the Parishioner, and so it was held in the Case of *Pool* and *Reynolds* in

in the Kings Bench. *Mich. 10 Jac.* But *Cro. El. 137.*
Mr. Ware reports a Case to be adjudged *Hutton 57.*
H. 18 Jac. B. R. that it was no good *Modus*, *10 Jac. 1. 641.*
 and that *Henden* vouched one *Bank's* Case *Modus to pay a*
 to be adjudged accordingly. *Ideo quare.* *car for Tythes*
 But it seems a good *Modus*, for this being *due to the Par-*
 originally a *Modus* between the Parson and *son.*
 Parishioner, the Vicar might be endowed
 with the *Modus*; but this must be intended
 also where the endowment is time out of
 mind, and not to be produced, or where
 the Vicar hath it specially in his endow-
 ment.

A payment to the Parson by Custom
 may be good against the Vicar. *Yelverton 86.*
contra Bulstr.

But to pay a Rate to the Parish Clerk *3. 220.*
 is no good discharge of Tythes against the *Leonard. 1. 94.*
 Parson or Vicar, unless the Parson be bound *Cro. El. 71.*
 by Custom to find the Parish Clerk, nor *Bulstr. 1. 220.*
 is a *Modus* to the Parson a good discharge *Wintel vers.*
 against the Vicar. *Secus* if there be a recom- *Child, M.*
 pence. *Cro. El. 136.* *14 Jac. B. R.*

And so having shewed what Prescripti-
 ons *de modo decimandi*, and *de non deciman-*
do, are good and allowable at the Com-
 mon Law, in the next place I shall shew
 how a *modus decimandi* or Prescription may
 be destroyed or lost.

C H A P. XVII.

*How a Modus decimandi or Prescripti-
on may be lost or destroyed.*

Rolls 1. 652.
f. 1, 2.

*What Matter
will destroy a
Modus.*

IF a Man have a *Modus* for a Mill, which is removed of necessity to a new place, because the Water *invito* has changed its course, here though the Mill be removed, the *Modus* remains.

But if the Owner of such a Mill shall of his own accord, and without any cause of necessity remove his Mill to a new place, in this case he shall lose his *Modus*.

Rolls 1. 652.
f. 2.

If a Man have a *Modus decimandi* for two Messuages and two Mills to pay twenty shillings *per annum*, and he erects a new Mill in one of the Messuages, the *Modus* shall not extend to free the new Mill.

Stepney vers.
Warren.
P. 41 El. B. R.

There have been Opinions that Unity of Possession, that is, to have Fee-simple in the Rectory, and likewise in the Land to which the *Modus* is annexed, should destroy a Prescription or *Modus decimandi*.

Sir John Hollis
Case. T. 9 Jac.
B. R.

But if a Man have four Water Corn-Mills, for which he hath time out of mind paid a *Modus* of four shillings *per annum*, and pulls down one of them, yet the *Modus* remains, and he shall still pay the four shillings.

C H A P.

C H A P. XVIII.

By what Conveyances, and by what Names Tythes may be granted, conveyed, demised, &c. and what Demises Parsons and Vicars may make of their Glebe and Tythes.

Regularly Tythes at this day cannot be granted or demised but by Deed in Writing under Hand and Seal, or by matter of a higher nature, as Fines, Recoveries, &c. But in such cases, as they are become Lay-Fee they may be devised by Will in writing as Lambs may; but they cannot be granted by Copy of a Court-Roll, because they cannot be parcel of a Mannor.

But Tythes cannot be conveyed or demised by any parol Agreement, unless it be to the Owner of the Land for one year by way of Retainer: * And some Opinions have been, that it is good for more years. *Ideo quære.*

Stiles 261.
By what Conveyances Tythes will pass.
Hungerford
vers. Hawland.
T. 36 El. ro.
560. per Owen
Cro. El. 814.

Brettyman
vers. Woodward. P. 31.
El. ro. 17. b.
R. B.
Noy 89.
Cro. Jac. 137.
Hetley 3.

Hughes 233. Bellamy vers. Bapthorp. M. 2 Car. ro. 179. B. R. Co. 4. 35. a. * Yelverton 94, 95. Latch 176. Noy 81. 121. Yelverton 94, 95. Brown 2. 11. *Ideo quære.*

Tythes impropriate are at this day by the several Statutes of dissolution become Lay-fee, and will pass by the name of Hereditaments; but by the Grant of a Portion of

of Tythes, the Tythes belonging to a Rectory will not pass.

There have been some Opinions that a Man may without Deed sell his Tythes to the Land-holder for more years than one, but not lease them without Deed.

Stat. 32 H. 8.
cap. 7.

Tythes impropriate may be past from one to another by Deeds of Bargain and Sale, inrolled according to the Statute of 27 H. 8. they may be transferred in use upon good consideration by Deeds of Covenant to stand seised, or by Fines or Common Recoveries, and may be sued for by Writs of Assize, of Novel Disseisin, Writs of Entry, Writs of Right, or other real Actions, or by *Ejectione firme*.

But upon a Lease for Lives of Tythes, no Rent can be reserved to be recovered at or by the Common Law, for no Action of Debt will lie, or Distress can be taken, & *ubi non est remedium, ibi non est jus*.

But upon a Demise of Tythes for years a Rent may be reserved, because an Action of Debt will lie upon such Lease upon the Contract.

C H A P. XIX.

What barren Lands are free from the payment of Tythes within the Statute of 2 E. 6. cap. 13.

IN the Statute of 2 E. 6. there is a Proviso ^{2 Ed. 6. ca. 13} to this effect:

That all such barren Heath or waste Ground, other than such as be discharged from the payment of Tythes by Act of Parliament, which before this time have lain barren and paid no Tythes by reason of the same Barrenness, and now be, or hereafter shall be improved and converted into arable Ground or Meadow, shall from henceforth after the end and term of seven years next after such Improvement fully ended and determined, pay Tythe of Corn and Hay growing upon the same, any thing in this Act to the contrary in any wise notwithstanding.

This Clause was added for the encouragement of Tillage and improvement of Lands by Water or otherwise; and therefore though here be no words of discharge of the payment of Tythes, during the first seven years, yet by a reasonable intendment, the same shall be discharged from the payment of Corn and Hay, for the first seven years after the improvement; and that is proved by the subsequent Clause, whereby it is provided.

<sup>2 Inst. 656.
Dyer 170. b.
P. 5.</sup>

That

Flowd. 204. a.
396. b.

That if any such barren waste or Heath-Ground hath before this time been charged with the payment of any Tythes, and that the same be hereafter improved and converted into Arable or Meadow, that then the Owner or Owners thereof shall during the seven years next following from and after the same Improvement, pay such kind of Tythes as was paid for the same before the said Improvement, any thing in this Act, &c.

So that it appears plainly by this *Proviso*, that it was the intent of the makers of this Law only to free these improved Lands from the payment of such Tythes as were produced by the improvement, which must be Hay or Corn and no other.

Next, suppose a Man have barren Lands within this Law, which are free from the payment of Tythes by Prescription, real Composition, &c. It should seem by the penning of the aforesaid *Proviso*, that he should pay Tythes for the same after the seven years, this *Proviso* only providing for such Lands as are freed by Act of Parliament.

But that doubt seems cleared by the next precedent *Proviso* in this very Act, whereby it is provided.

That no Person shall be sued or otherwise compelled to yield, give or pay any manner of Tythes for any Mannors, Lands, Tenements or Hereditaments, which by the Laws and Statutes of this Realm, or by any Priviledge or Prescription, are not chargeable with the payment of any
such

such Tythes, or that be discharged by any Composition real.

So that this Proviso preserves all former legal discharges.

But the great question upon this Law is, what shall be said to be barren Heath or waste Ground within this Law, and Sir Edward Coke defines barren Lands in these Words.

Terra sterilis est terra infœcunda nullum ferens fructum. But that definition will not hold in this Case, for it does appear by the second Proviso, that such barren Lands are intended that are barren *quoad Agriculturam*, that is, such barren Heath or waste Ground that of its own nature, without improvement by Lime, Marle, Manure, &c. will not being forth Corn or Hay.

2 Inst. 655.
656.

Dyer 170. p. 5.
Co. Ent. 462,
463.

But if the Ground be not fit for Tillage, yet if it be not *suapte natura* barren, it is not within this Law. As if a Wood be stubbed and grubbed up, and made fit for the Plough, and reduced to Tillage, it shall pay Tythes presently; for Wood-ground is *Terra fertilis & fœcunda*.

6 E. 6. per Bendloes.
2 Inst. 656.
Hill. 9 Jac. C.B.
ex motione
Houghton.

So if Marish, Meadow or other Land by neglecting to scower the Trenches or Sewers, or by sudden inundation be drowned; or if by ill husbandry or negligence fertile Land be over-run with Gorse, Whins, Broom, Fern, Bushes, Briers, &c. yet they shall not have the benefit of this Proviso, because of their own natures, they are fertile and apt for Tillage, and the Parson, Vicar, &c. shall not lose his Tythe by the ill husbandry of the Parishioner.

2 Inst. 656.
More 909.

Co. 10. 86. b. :
Co. 6. 18. a. :
If Lands were barren Heath or waste Ground at the time of the making of this Act, and were improved, and had or might have had the benefit of this Law, and after return to their barrenness, the Owner of such Lands, shall not have the benefit of this Law a second time upon a second improvement; but I take the Law to be otherwise, if the Lands had been improved before the time of the making this Law, and were then become barren again, for there I take it, upon a new improvement the Owner of such Lands, shall have the benefit of this Law.

More 430.
3 Bulst. 165.
2 Inst. 656.

Marsh Lands new gained from the Seas, and Fen Lands gained from the fresh waters by draining, banking, &c. are not within the meaning of this Law to be freed from the payment of Tythes, during the first seven years after the gaining.

But the Determination of this point, which is or which is not barren Land within this Statute, commonly falls out to be determined by common Jurors, which notwithstanding the Direction of the Judges are seldom so favourable to the Church as they ought.

27 H. 8. c. 20.
32 H. 8. c. 7.
*confirmed by the
Statute of 2 E.
6. Canons Provincial. Cap.
Quia quid maledictionis.
Cap. Erroris.
damnabilis.*

This proviso only charges the payment of Corn and Hay after the seven years and the second Proviso provides only for the payment of such like Tythes as were formerly paid before the Improvement, for the first seven years after the Improvement and makes no provision for the payment of other Tythes, save Corn and Hay, after the seven years: So that it may seem to imply

imply a discharge of all Tythes, but Corn and Hay after the seven years: But to this I answer, that there being several Laws both Statute and Canon, made formerly for the due payment of Tythes, and no negative words in this Act, it shall not abrogate those Laws to the prejudice of the Church by implication.

Cap. Quoniam
propter. Cap.
Quoniam ut au-
divimus, &c.

C H A P. XX.

What a real Composition is, and in what Cases Lands shall be freed of the payment of Tythes by such Composition real.

THAT which we call a real Composition is, where the present Incumbent of any Church, together with his Patron and Ordinary do agree by Deed under their Hands and Seals, or by Fine in the Kings Court, that such Lands shall be freed and discharged of the payment of all manner of Tythes for ever, paying some annual payment, or doing some other thing to the ease, profit or advantage of the Parson or Vicar, &c. to whom the Tythes did belong. And these real Compositions have ever been held and allowed here in *England* to be a good discharge of the payment of Tythes: And from these real Compositions it is intended, all Pre-

Where Tythes shall be discharged by a real composition, and what it is.

Co. 4. 44. a.
2 Inst. 655.
Doct. & Stud.
l. 2. cap. 55. f.
ult.

scriptions *de modo decimandi* first took their rise and beginning, though I doubt most at this day have grown up from the negligence and carelessness of the Clergy themselves.

Vide Lindw.
cap. *Quoniam*
propter verbo
Redemptionem,
Upon this
matter.

And such Compositions may be made by the Parishioner alone without the Patron and Ordinary, but it then binds only for the Life of the Incumbent, and will be avoided by his Resignation, Deprivation, or being absent eighty days in a year, from his Cure, if he have Cure of Souls.

But it seems some of the Canonists and Civilians are of Opinion, that all Compositions between the Lay and Clergy to be discharged wholly of payment of Tythes, or to pay less in recompence than the full value, are invalid, but otherwise between Clergy-men; but by the Common Law, which must govern here, there is no such difference allowed, but all real Compositions made as aforesaid are good and valid.

Hob. 176:

But note, That no Composition made by Parol or Word of Mouth only, and not reduced into Writing under Hand and Seal, is binding at all, unless it be upon Record as by Fine, &c.

13 El. cap. 10.

But I conceive at this day no real Composition can be made to bind the Successor of the Parson or Vicar that makes the same, for they are now restrained by the Statute of 13 Eliz. *To make any Grants other than for twenty one years, or for three Lives, with the other qualifications mentioned in the said Act.*

So that it seems clear to me, that Parsons and Vicars at this day, notwithstanding the confirmation of the Patron and Ordinary, cannot charge their Benefices or any thing belonging to them, other than for twenty one years or three Lives as aforesaid, and that only by Leases confirmed by Patron and Ordinary of things usually demised; whereupon the accustomed yearly Rent or more is reserved.

So that what has been said concerning real Compositions is only to be intended of such as were made before that and other latter Statutes; for I take it a real Composition at this day will only bind the Parson himself, whilst he is Parson Resident, and serving the Cure, *quod nota.*

And it hath been held, that if there be two Proprietors or Farmers of Tythes, that an Agreement with the one shall bind his Companion. More 915.

The Canon Law allows a Composition with Lay-Men for Tythes received, but not for Tythes to come. Lindwood c. Quoniam propter verbo Redemptionem. Greg. Decret. l. 1. 445. c. 2. Statuimus.

See a Decretal of *Alexander the Third*, whereby the Pope confirms Compositions betwixt Clergy-Men.

C H A P. XXI.

What Monastery Lands are, or may be free from the payment of Tythes.

Jones 317.
188. Star.
27 H. 8. c. 28.
*What Monastery
Lands shall be
freed from pay-
ment of Tythes.*

IT is without dispute, that none of the Abby and Priory Lands, that came to the Crown by the Statute of 27 H. 8. or before, are freed or discharged of the payment of Tythes by the Statute of 31 H. 8. cap. 8. or by any other Law or Act of Parliament.

But in the Statute of 27 H. 8. there was a *Proviso*, that notwithstanding that Act the King might by his Letters Patents under the great Seal of *England* continue any of the said Monasteries, and that *Proviso* is left out of all the modern Prints, only *Rastal* in his abridging of that Statute makes some mention of it.

Now the Reader must observe once for all, that all Monasteries under two hundred pounds *per annum* were to have been dissolved by the Statute of 27 H. 8. and are therefore usually called the smaller Abbies, and those of two hundred pounds a year and upwards were not dissolved till the 31st. year of H. 8. and are commonly called the great Abbeyes.

And upon these two Statutes this Case lately hapned in the Exchequer Chamber between *Walklate* Farmer of the Rectory of *Utoxator* in the County of *Stafford* to the Dean of *Windsor*, and *Wilshaw* Owner of the Farm

Farm in that Parish, that was parcel of the possessions of the Abby of *Croxden* in the same County, which was one of the small Abbeys, and of the *Cistercian* Order; which Order was freed of the payment of Tythes, as shall be shewed hereafter, and this Abby was discovered by the Defendant *Wilshaw* to be continued by Letters Patents under the great Seal of *England*, and so not dissolved till the Statute of 31 H. 8. whereupon the Defendant was dismissed, and the Court clearly held the Lands discharged of 31 H. 8. c. 13. payment of Tythes by the Statute of 31 H. 8. I mention this Case for the singularity, not for any nicety in the Learning of it.

By the Statute of 31 H. 8. before menti- 31 H. 8. c. 8. oned, there is a Clause to this effect.

That the King and his Patentees, which then The Clause of had, or then after should have any Monasteries, 31 H. 8. that Abbathies, Priories, Nunneries, Colleges, Hos- frees Abby pitals, Houses of Friars, &c. or any Manors, Lands. Lands, &c. which did belong to them, should have, hold, retain, keep and enjoy the said Mannors, &c. according to their Estates and Titles discharged and acquitted of the payment of Tythes as freely and in as large and ample manner as the said Abbots, &c. or any of them had, held, occupied, possessed, used, retained or enjoyed the same, or any part thereof at the days of their dissolution.

And the Reader is to observe, that the Abbots, &c. at the time of their dissolution held their Lands discharged four manner of legal and regular ways, which were allowed by the Laws of this Realm, to wit,

Y 4

I. By

The Parsons Counsellor : Part II.

1. By the Bulls of Popes. 2. By real Compositions with the Parson, &c. Patron and Ordinary. 3. By Prescription. And 4. By Order.

But there is another sort of discharge, though not a legal one, has been allowed in this Case to make a fifth sort of discharge, and that is perpetual unity, where the Abbot has had the Rectory of any Church and Lands in the same Parish time out of mind, which have been held free from the payment of Tythes by all the time of memory ; and of these several discharges I will speak in order.

And first of discharges by the Popes Bulls it is to be understood, that when the Pope usurped a power over the Clergy here in *England*, he did at his pleasure grant Exemptions to this or that Abby, or to whom else he pleased to be freed from the payment of Tythes which was allowed as a good discharge against the Parsons and Vicars, who in many places suffer by these Bulls to this day, these Bulls being turned into Prescriptions, &c.

Real Compositi-
ons.

The second sort of discharges was by real Compositions between the Parson or Vicar, and the Abbots, Priors, &c. confirmed by Patron and Ordinary ; of these we have spoken at large before in the twentieth Chapter, and therefore shall not repeat it, but pass to the third sort of discharges.

The third sort of discharges is by Prescription, of which we have likewise spoken at large before in the sixteenth Chapter, to which I shall refer the Reader.

I shall only observe to to the Reader again in this place, that the Abbots, Priors, and other Religious persons might prescribe generally to be free from the payment, or to be discharged of the payment of Tythes without any recompence to the Parson, &c. but a Lay-man could not prescribe absolutely to be free from payment of Tythes, but *sub modo*, that is, paying or doing something to, or for the Parson, Vicar, &c. in recompence and satisfaction of the Tythes, as you may at large see in the Chapter here before.

And it is to be observed, that no Abbot, Prior, &c. could make any such Prescription by the Common Law, that was not founded before the time of memory, that is before the first year of R. 1. which is the time of the limitation of all Prescriptions at the Common Law, which rejects ^{2 Inst. 653.} the practice of the Canon Law, which, as should seem, allows the limitation of a Prescription or Custom to 40 Years.

But Quere of this, for the ^{2 Inst.} here cited refers to *Coke on Lit.* § 170. Where *Littleton* cites this opinion and another opinion after, which last according to my Lord *Coke's Pref.* to his *1 Inst.* p. 3. a. is *Littleton's* own Law. Yet *Littleton* makes a Quere on it, and seems to prefer the opinion here set down. See *Tyrels Bibl. Polit.* 591, 592.

It may reasonably be demanded, how this manner of discharge can be made out at this day, since there is now no person living that can prove how the Abbots held and enjoyed their Lands; To which I answer,

swer, that what was done before the dissolution of Abbies must now be proved by what has been done since; for if Monastery Lands have been held all the time of memory since the dissolution, freed from the payment of Tythes, it shall be intended, that they were so held before; and therefore they have not paid or been questioned since.

Discharge by Order.

The fourth sort of discharge is by Order, and this discharge also for the most part depends upon Popes Bulls or Grants, who at pleasure granted Exemption to what Orders they pleased.

Causa 16. q. 1. decimas.
2 Inst. 652.
Seld. Hist. decim. 120.

Decret. Gregor. rii ex parte tua de decimis.
Seld. de decim. 406.
Dyer 277, 278.
4 Concil. Lat. Can. 56. Causa 16. q. 1. c. 2. Decim. & ibi questi sunt.

Stat. 2. H. 4. c. 4.

About the year of our Lord, 1150. the most Religious Orders then in being were discharged of the payment of Tythes; but about that time Pope *Adrian the IV.* reduced them to *Cisterrians*, *Hospitaliers* and *Templers*; and about the Year, 1215. Pope *Innocent the III.* added the *Præmonstratenses*. But the Privileges granted to these Orders extended only to the Lands these Orders held in their own manurance, and not to any which was held by their Tenants or Farmers,

But about the beginning of the Reign of *H. 4.* the *Cisterrians* attempted to have enlarged their Privilege to their Tenants and Farmers, which tending to the ruine of many poor Parsons and Vicars that had Cure of Souls, was complained of in a Parliament held in the second Year of *H. 4.* Whereupon it was Enacted, That not only the *Cisterrians*, but all other Orders that put any Bulls in execution for the discharging any

any of their Lands from the payment of Tythes in the Hands of their Tenants and Farmers, shall incur a Premunire, that is, forfeit all their Goods and the profits of their Lands during Life, and be likewise imprisoned during the offenders Life; which gave such a check to that proceeding, that I do not find any thing of that nature after attempted.

The *Templers* after in the Council of *Vienna*, which was held in the Year of our Lord, 1311. and in the fourth Year of E. 2. were condemned for Heresie, and all their Possessions by Act of Parliament made in the 17th. Year of the same King, were transferred to the *Hospitaliers* or Knights of St. *John* of *Jerusalem*, who enjoyed them til the thirty second Year of the Reign of King *Henry* 8. at which time by Act of Parliament they were settled upon the Crown.

The Templers.
2 Inst. 432.

Stat. 17 E. 2. c

32 H. 8. c. 24.

Kelwey 174. a.

But where it is said in *Kelwey*, that the *Templers* were condemned of Heresie in the 8th Year of E. 2. and their Lands given the same Year to the *Hospitaliers*, it is a great error; for it is clear, that the Council of *Vienna* was held in the fourth Year of that King, and chiefly called against the *Templers*; and it is as clear that their Lands were not here in *England* settled upon the *Hospitaliers* till the 17th Year of the same King

And though the Lands of the lesser Monasteries be not within the benefit of the Statute of 31 H. 8. to be freed of the payment of Tythes; yet they ought to enjoy all such Privileges as are annexed to the Land,

Where the lesser Abbies may be freed of Tythes.

Jones 3, 372,
373.

Land, and therefore such Lands in whose hands soever they come, shall be freed of the payment of Tythes; by real Compositions and Prescriptions *de modo decimandi*, but not by Prescriptions *de non decimando*, unity of Possession, Order of Bulls of Popes: but in all those cases the Parsons and Vicars have the advantage by the dissolution of all those Abbies that were dissolved by the Statute of 27 H. 8. For the Parsons and Vicars shall in such cases be restored to their Tythes again, which in all Justice they ought in all other cases, if the Parliament had been pleased.

The lesser Monasteries, that is, which were under 200 l. *per annum*, of the Orders of *Cisterians* and *Premonstratenses* were, as hath been said, dissolved by the Statute of 27 H. 8. have lost the privilege of being discharged of the payment of Tythes, unless they were continued as the Abby of *Croxden* was; but those Monasteries of those Orders that came to the Crown by the Statute 31 H. 8. retain the privilege of those orders in not paying Tythes. But this is to be understood only for such time as the Owners hold them in their own manurance; for if they let them out to Tenants, they shall have no more Privilege than the Tenants of those Orders of the *Cisterians* and *Premonstratenses* had, which was none at all.

But it must be
Owners in Fee-
simple or Fee-
taylor, and not
Tenants for
Lives or Years.
Hardres 174.

Jones 2, 3, &c.
Cro. Jac. 607.
Hob. 306.

But note, That if the King after the dissolution of the lesser Monasteries (which had been of any of the Orders that were discharged of the payment of Tythes) had

grant-

granted any of their Lands to any of the greater Monasteries which were not dissolved till the Statute of 31 H. 8. yet those shall not retain the Privileges the Abbots had at the time of the former dissolution; the right immediately reverting by the dissolution to the Parsons and Vicars to whom the Tythes of right did belong, the greater Abbies could not hold them legally discharged at the time of the second dissolution: so that there is a manifest difference between this and the Case of *Walklate* and *Wilshaw* before remembred, for in that case the Monastery was continued, and not dissolved till the Statute of 31 H. 8.

Lands of the lesser Abbies granted to the bigger not freed.

And it is to be observed, That no Lands acquired by any of the Monasteries of those Orders which were so freed from payment of Tythes after the Council of *Lateran*, which was in the Year of our Lord, 1215. and by consequence none that were founded after that Council, are discharged of the payment of Tythes, either in their own or their Tenants hands, for by that Council the Privilege was limited to such Lands as these Orders had at the time of that Council.

Lands Purchased after the Privileges granted, not freed. Conc. Later. 4. Can. 55. Seldens Hist. of Tythes 121.

And although any Abby-Lands, of the great Abbies which were of the *Cistercian* and *Præmonstratensian* Orders were in the hands of Tenants for Years at the time of the dissolution, yet the King and his Patentees after the Leases determined shall hold them discharged, whilst the Patentees and Owners hold them in their own hands,

Dyer 277. b. p. 60. Cro. Jac. 559.

hands, but the King's Tenants shall hold them discharged because of the Royal Prerogative of his Person, not being intended fit for Husbandry.

5 Perpetual unity.

Co. 247. b. & c.

Co. 11. 14. b.

Dyer 349. p.

16.

More 528.

Hob. 311.

306. 298.

300.

2 Inst. 655.

More 46, 47.

Cro. Jac. 608.

Having now said thus much of the four legal manner of discharges before mentioned, I shall proceed to that of perpetual unity, which cannot be said to be a legal discharge of the payment of Tythes: Yet because the Abbots, Priors, &c. at the time of the dissolution held the Lands discharged of the payment of Tythes, though not legally discharged of Tythes, it hath been resolved by many Judgments and settled, that this is a good discharge within the meaning of the aforesaid clause of 31 H. 8. Now that which we call a perpetual unity, is, as hath been said, where an Abbot, Prior, &c. time out of mind hath been seised of the Lands out of which the Tythes arise, and the Rectory within which Parish the Lands lie.

Definition.

And it is to be observed that every perpetual unity, that shall discharge the Lands from the payment of Tythes must have these four qualities.

First, It must be *justa*, that is, by good and lawful Title.

Co. 11. 44. b.
Hob. 300.

Secondly, It must be perpetual, that is, the Abby must be founded and endowed with the Land and Rectory before the time of memory, which by the Rules of the Common Law, as has been said, must be before the first Year of R. 1. for if by any Records, Deeds, or other legal and good Evidence it can be made appear, that
either

either the Land or Rectory came to the Ab-
by since the said first Year of R. 1. the
union is not perpetual; and yet if the Ap-
propriation be Ancient, as in the time of
E. 4. or before, though the Lands cannot
be discharged upon the score of perpetual
unity; yet they may by Prescription, if in
truth the Lands were held discharged of
the payment of Tythe.

Thirdly, Such unity as shall discharge
Lands of the payment of Tythes within
this Law, must be *equalis*, that is, the Ab-
bots, Priors, &c. must be seised in Fee-sim-
ple, as well of the Lands upon which, &c.
as of the Rectory.

Cro. Jac. 454.
Co. 2. 48. a.

Lastly, Such unity must be *libera*, that
is, free from the payment of any manner
of Tythes, for if their Farmers at will,
years, &c. have paid any manner of Tythes
to the Abbots, Priors, &c. or their Far-
mers of the Rectories, the perpetual unity
will not serve. And therefore where such
perpetual unity is pleaded in discharge of
Tythes, the adverse party may reply, That
the Tenants or Farmers before the dissoluti-
on paid some sort of Tythes, and so avoid
the perpetual unity.

Having first given the Reader satisfacti-
on that all the Lands that came to the
Crown by the Stat. of 27 H. 8. and before,
can have no benefit of the discharge given
by the Statute of 31 H. 8. and having al-
so shewed how many ways Lands may be
discharged from payment of Tythes that
came to the Crown by the said Statute of
31 H. 8. It rests now that I should say
some-

something of those Lands that have since come to the Crown by the Statutes of 32 H. 8. cap. 24. 37 H. 8. cap. 4. and 1 E. 6. cap. 14.

Co. 2. 47. a.
How other
Lands stand
that came not
to the Crown
by 31 H. 8.

It is a Rule taken in the Archbishop of *Canterburies* Case, that neither the letter nor the meaning of the Statute of 31 H. 8. extended to free or discharge any Lands from the payment of Tythes, save those that came to the Crown by that Act; for as that Book says, it is absurd that the branch of the Statute of 31 H. 8. concerning Tythes, should be extended to a future Act, that the makers of the Statute of 31 H. 8. without the Spirit of Prophecy, could not have the prescience of.

More 913.
Cro. Jac. 57.
Hill. 2 Jac.

And as to those that came to the Crown by the Statute of 32 H. 8. c. 24. it was adjudged in the Case of *Spurling* and *Quarles*, that they are not discharged of the payment of Tythes.

And after in the Case between *Urry* and *Bowyer*, 8 *Jacobi* in the Common Pleas this point was moved again, and the Court was divided.

Jones 192. &c.
Larch 89.
Hughes 392.
Bridgm. 32.

But there is a latter Judgment that seems to oppose these former resolutions, it was between one *Witton* and Sir *Richard Weston*, that was afterwards Lord Treasurer, *Trim. 14 Car. 1. B. R.* and the Question was, whether those Lands of the Hospitaliers that came to the Crown by the Statute of 32 H. 8. cap. 24. were discharged of the payment of Tythes by that Statute of 32 H. 8. or by the former Statute of 31. and in that Case *Dodridge* and *Jones* Justices, held that they

they were discharged within the Statute of 31 H. 8. and they did in effect deny the Books before-cited to be Law; the Chief Justice *Hide* was of Opinion, That they were not discharged by the Statute of 31 H. 8. but by that of 32. So that by their three Opinions, the Defendant Sir Richard *Weston* had Judgment; but *Whitlock* was of Opinion, That those Lands were not discharged of the payment of Tythes by the one Statute or the other: Now, upon the whole matter, I shall submit to the Judicious Readers Judgment, whether this latter Resolution be of any weight to shake the former Resolutions; since, in this case, though there were three for giving Judgment for the Defendant, yet to the point controverted upon the Statute of 31 H. 8. there were two against two, and that they were not discharged by the Statute of 32. there were three against the Chief Justice *Hide*. So that I conceive the Law remains according to the former Resolutions, That there are no Lands free'd from the payment of Tythes by any Statute, but those that come to the Crown by the Statute of 31 H. 8. *tamen* *unde quære*.

If an Abbot, Prior, &c. that by Order, Syderfin 1267 Prescription, &c. held his Land discharged of the payment of Tythes, had granted away his Land to a College, &c. the College should not hold them discharged.

I must confess I have met with no Judgments upon those Lands which came to the Crown by the Statute of 37 H. 8. but

Z

those

Jones 185.
Co.2.47.2.

those being the same with those that came to the Crown by the Statute of 1 E.6. c.14. I conceive neither those that came to the Crown by either of those latter Statutes have any privilege at all; and it is agreed in that very case of *Witton* and *Weston*, that those Lands that came to the Crown by 1 E.6. could not have any benefit by the clause of discharge in the Statute of 31 H.8.

So that I shall conclude, That there is no Land can have any Privilege at this day to be discharged of Tythes that belonged to the Abbots, Priors, &c. but such only as came to the Crown by the Statute of 31 H.8. cap.13.

C H A P. XXII.

What Personal Tythes are, and in what manner they are payable.

Lindwood cap.
Quoniam prop-
ter verb. deci-
mæ personales.
What Personal
Tythes are, and
where payable.
The Canon.

THE Canonists define Personal Tythes thus.

Decima personales sic dictæ, quia potius in respectu personæ solvuntur quam rei, ut puta de artificio, negotiatione & militia. And by the Canon,

Decimæ personales solvantur de artificio & Mercatoribus, scilicet de lucro negotiationis, & militibus.

militar de carpentariis, fabris cœmentariis, textoribus, pandoxatricibus, & omnibus aliis operariis stipendiariis, ut videlicet dent decimas de stipendiis suis, nisi stipendiarii ipsi aliquid certum velint dare ad opus vel ad lamen Ecclesiæ, Verbo negotiationis.
 si Rectori ipsius Ecclesiæ placuerit. And
 Mr. Lindwood in his Gloss adds,

Et scias quod in istis decimis mere personabilibus, quæ considerantur ex solo lucro, deducuntur expensæ tam in re quam circa rem & extra rem factæ. Et nota, quod de solo lucro debetur hæc decima; unde si emens mercem eam non vendat, sed donet vel sibi retineat, non teneatur decimare, quia non lucratur.

So that it appears by the Canon Law, that every one ought to pay for a personal Tythe a Tenth-part of all his clear Gains, deducting his Charges and Expenses for a personal Tythe; but if a Man buy Merchandizes, and do not sell them to profit, or give them, or make use of them himself no Tythe is to be paid, because there is no gain made of them.

Now let us see what the Statute of 2 E. 6. 2 E. 6. c. 13. says to us concerning personal Tythes; and by that Statute it is Enacted,

That every person exercising merchandizing, bargaining and selling, clothing, handicraft, or other art or faculty, being such kind of persons, as then before within forty years had accustomedly used to pay such personal Tythes, or of right ought to pay (other than such as be common Day-Labourers) shall yearly pay for his personal Tythes, the Tenth-part of his clear gains, his charges deducted. The Statute for Personal Tythes

The Parsons Counsellor: Part II.

And where handicraft Men have used to pay their Tythes within this forty years, the same Custom of Tythes is to be observed; and if any person refuse to pay his personal Tythes, &c. it shall be lawful to the Ordinary of the same Diocess to call the same Party before him, and by his discretion to examine him by all lawful and reasonable means, other than by the Parties own corporal Oath concerning the true payment of the said Tythes.

This Act of Parliament restrains the Canon Law in two things; first, where the Canon was general, that all persons in all places should pay their personal Tythes, the Act restrains it to such kind of persons only as have accustomably used to pay the same within forty years before the making of the Act. Secondly, whereas by the Ecclesiastical Laws they might before this Act have examined the Party upon his Oath concerning his Gain; this Act restrains that course, so that the Party cannot be examined upon Oath; and by this Act the Day-Labourer is free'd of the payment of his personal Tythes.

It cannot be intended upon this Act, that if such Tythes have been sometimes paid within forty Years, that they are therefore due, but they must have been accustomably, that is, constantly paid for forty years, next before the Act.

And if it be demanded how such payment must now be proved forty years before the making of the said Act? I answer, as in other like cases *a posteriore*, by what

has been done all the time of memory since the Act.

There has been some question amongst the School-men and Canonists, whether personal Tythes ought to be paid of unlawful Gain, to which you shall hear what a great School-man and Doctor says.

Quod si aliqua male acquiruntur dupliciter uno modo, quia ipsa acquisitio est injusta, puta quæ acquiruntur per rapinam, furtum seu usuram, quæ homo tenetur restituere, non autem illi de eis decimam dare, tamen si aliquis ager sit emptus de usura, de fructu ejus tenetur usurarius decimas dare, quia fructus illi non sunt de usura, sed ex Dei munere: quedam vero dicuntur male acquisita, quia acquiruntur ex turpi causa, sicut de meretricio & histrionatu, & aliis hujusmodi, quæ non tenentur restituere unde de talibus tenentur decimas dare, secundum modum aliarum personalium decimarum, tamen Ecclesia non debet eas recipere, quamdiu sunt in peccato, ne videatur eorum peccatis communicare, sed postquam penituerint, possunt ab eis de his recipi decimæ.

Tho. Aquinas
Sum. 2. 2. c.

q. 87. art. 20.

Whether due of
gotten pro-

So that by this great Doctor's Opinion it seems, that of ill gotten Gain, of which restitution ought to be made, no personal Tythe is due; and yet if by ill gotten Gain Field be purchased, Tythe ought to be paid of the Fruits thereof: But of ill gotten Gain, where no restitution is to be made, here Tythes ought to be paid, but not received by the Church till the Sinner have repented him of the evil, and after such repentance the Church may receive them.

Lindwood

cap. Quoniam

propter verb.

injuste acquirit.

In the Glos,

& Greg de crer.

cap. ex trans-

missa in the

Gloss verbo in-

juste.

The Parsons Counsellor: Part II.

These personal Tythes are accounted amongst the Offerings, of which we are to speak next, and ought by the Parishioner to be offered to the Church where due; but I am of the Opinion of him that said, *Hæ decimæ personales magis difficultate & subtilitate quam utilitate existunt.*

Rolls I. 646.
b. 1.

It hath been Resolved, That Servants in Husbandry shall not pay any personal Tythe.

Hawking, Hunting, Fishing, Fowling, &c. fall under these Rules of Personal Tythes. *Of Jews, Linwood 12.a. Of Jews and Saracens, Selden de Dec. 152.*

C H A P. XXIII.

What Oblations, Offerings, &c. are, and where due.

Oblations and Offerings what, and where due,

Offerings are defined by the Canonists to be,

Quæcunque a piis, fidelibus Christianis offeruntur Deo & Sanctæ Ecclesiæ, sive res sive mobiles sint, nec refert an legantur Testamento, aut aliter donentur.

It seems that in the time of Popes there was an Expectation, that every one present at Mass should offer something for St. Gregory tells us, *Quod omnis Christianus procuret ad missarum solennia aliquid offerre.*

Greg. 78. habetur de Consecrat. div. 1.
Can. 4.

And by a Canon in the Council *Matisc.* it is decreed, *Ut omnibus dominicis diebus altaris oblatio ab omnibus viris & mulieribus offeratur, tam panis quam vini, ut per has immolationes, &c.*

But *Becanus* a Learned Jesuit is more moderate; for he tells us, *Quod nemo tenetur ad illas Oblationes, nisi vel necessaria sint ad sustentationem ministrorum, vel consuetudo ad eas alicubi obliget.* Becan. Sum. Theol. 3. q. 86.

And these Offerings belonged properly to the Priest or Minister of the Church or Place where they were made; for so is the Canon of Pope *Damasus*. Can. Damas. 11 Pap. Et habetur 10. q. 1.

Quod Oblationes quæ intra sanctam Ecclesiam offeruntur, tantummodo Sacerdotibus qui quotidie servire videntur, licet comedere & habere, &c.

But it seems that private Chappels carried away many of the Offerings belonging to the Mother-Churches; to avoid which *Othobon* the Pope's Legate here made a Canon to remedy that mischief to this purpose,]

Quod Capellani ministrantes in Capellis hujusmodi, quæ salvo jure matricis Ecclesiæ sunt concessæ, universas Oblationes & cætera quæ ipsis non recipientibus ad Ecclesiam matricem provenire deberent, ipsius Ecclesiæ Rectori sine difficultate restituant, cum illud tanquam alienum, juxta nequeant retinere. Si quis autem restituere contempserit, suspensionis vinculo, quousque restituerit, se noværit innotatum. Cap. de Oblationibus.

The Parsons Counsellor: Part II.

So that it seems by this Canon, that Chappels that had Parochial Rights, the Chaplains of them might retain the Offerings; but where the Parochial Rights were saved to the Mother-Church, the Chaplains of such Chappels were to account to the Rector of the Mother-Church for the Offerings made at such Chappels.

Cap. Quia quidam maledictionis, &c.

There was another Canon made by Simon Mepham Archbishop of Canterbury, and his Clergy, in the year of our Lord 1328. reciting,

Quia quidam maledictionis filii in nuntium solennis, purificationibus mulierum, mortuorum exequiis, & aliis, in quibus ipse dominus in ministrorum suorum personis solebat oblationum libamine populariter honorari, ad unius Denarii, vel alterius modicæ quantitatis oblationem, populi devotionem restringere sunt moliti, residuum oblationis fidelium suis pro libito, vel alienis usibus mulieres applicantes: Præsentis declaratione Consilii declaramus & pronunciamus, omnes & singulos in præmissis, vel eorum aliquo imposterum delinquentes, vinculo majoris excommunicationis involvi.

So that upon the whole matter it appears, there were some Offerings free and voluntary, which the Parishioners or others were not bound to perform, but *ad libitum*. There were others by Custom certain and obligatory; as those for Marriages, Christnings, Churching of Women, Burials, &c. and that these were all due, and belonged to the Parish-Priest or Minister, that officiated

ciated at the Mother-Church or Chappel, that had Parochial Rights; the other Chappels that had not Parochial Rights, were to account to the Rector for the Parish-Church: Now let us see what the Statute of 2 E. 6. says, by which it is enacted,

That all and every Person and Persons, which 2 E. 6. c. 13, by the Laws and Customs of this Realm ought to make or pay their Offerings, shall yearly from thenceforth well and truly content or pay his or their Offerings to the Parson, &c. of the Parish or Parishes, where it shall fortune or happen him or them to dwell or abide, &c. *The Statute for Offerings.*

These Offerings which were free and voluntary are now vanished, and are not comprehended within this Law; but those that were customary and certain, as for Communicants, Marriages, Christnings, Churching of Women and Burials, are confirmed to the Parish-Priest, Vicars and Curates of the Parishes, where the Parties live that ought to pay the same; and they are only recoverable in the Spiritual Court; or an Action (I conceive) may be formed upon this Statute at Common Law. See *Stillinsf. Eccl. Cases*, 240, &c.

CHAP. XXIV.

What Mortuaries are, and in what Cases they are due at this day, and how much is to be paid for the same.

Where, and what is due for Mortuaries.

*Cap. Statutum
& infra, &c.
The Canon.*

BY a Provincial Canon made by Simon Langham, Archbishop of Canterbury, and his Clergy, in the year of our Lord 1378. it was decreed,

Quod si decedens tria vel plura cujuscunq; generis in bonis suis habuerit animalia, optimo cui debitum de jure fuerit reservato, Ecclesia sua, à qua Sacramenta recepit, dum viverit, sine dolo fraude seu contradictione qualibet pro recompensatione subtractionis decimarum personalium, nec non & oblationum, secundum melius animal reservetur post obitum pro salute animæ suæ Ecclesiæ suæ hujusmodi liberandum : quod si duo tantum in bonis decedentis extiterint animalia, de mansuetudine Ecclesiæ exactio qualibet nomine mortuarii remittatur : quodque si Mulier viro superstite obierit, ad solutionem mortuarii minime coerceatur ; Sed si post obitum mariti, in domo cum familiæ regimine vidua per annum supervixerit, juxta formam superius scriptam ad mortuarium obligetur : Hac autem interpretatione, consuetudini laudabili super mortuariis in nostra provincia aliter observare nolumus præjudicium generali ; quin si decedens numerum hujusmodi animalium habuerit seu non habuerit vivit aut

uxor prius vel post decesserit, super præstatione mortuarii consuetudo Ecclesiastica observetur; ad solutionem autem debiti de jure vel consuetudine mortuarii renuentes, volumus per ordinarios locorum censura Ecclesiastica coerceri.

How far this Canon was obeyed in England I can give no Account, but I have not found the English willing to have their Estates taken from them by Canons, nor have found that any Prohibitions have been granted in case of Mortuaries; nor have I observed any Complaints in Parliament against them (save that in the time of 2 R. 2. it is prayed, that Parsons and Vicars might not require Mortuaries of the Armour of any Man; but that it might remain to their Executors) till the 21 H. 8. and then they were settled by the Statute as follows.

1. ' That no Man should pay a Mortuary unless he died possessed of Goods to the value of ten Marks, that is, six pounds thirteen shillings and four pence. St. 21 H. 8. c. 6.
The Statute of
Mortuaries.
2. ' That no Mortuary should be paid or demanded, but in such places where they have used to be paid or given.
3. ' That they should be paid but in one place, and that at the Parties most usual dwelling and habitation, and there but one Mortuary, and that after the rate following; that is to say,
4. ' That if the decedent at the time of his death, had in movable Goods to the value of ten Marks clearly, his Debts first paid, and under

The Parsons Counsellor: Part II.

' under the Sum of thirty pounds, then he
' should pay three shillings and four pence and
' no more, and this must be in movables, and
' not in Chattels, as Leafes for years, &c.

5. ' That if the decedent died possessed of
' movables of the value of thirty pounds, and
' under the value of forty pounds, to pay six
' shillings and eight pence for a Mortuary.

6. ' If the decedents Goods be of the value
' of forty pounds or upwards, then to pay
' ten shillings for a Mortuary.

7. ' That no married Woman, Child or
' Person, not keeping House, should pay any
' Mortuary, nor a wayfaring Man, or other
' that was not resident where he died, but
' those to pay where they were last resident.

8. ' The Parson or Vicar are not by this
' Act barred of any Legacy given, or Of-
' fering to be made to them.

9. ' No Mortuary to be paid in *Wales*,
' *Calis* or *Barwick*, or in the Marches of
' *Wales*, but where accustomed.

10. ' It is provided, that the four *Welch*
' Bishops, and the Archdeacon of *Chester*,
' may, notwithstanding this Act, take their
' accustomed Mortuaries.

11. ' That where less hath accustomedly
' been taken for Mortuaries than is limited
' by the Act, there no more than is due by
' the Custom shall be taken.

2 Infl. 491.
Mortuaries due
only by Custom.
See for this
Stilling. Eccl.
Cases 248.

Sir *Edw. Coke* is of Opinion, That there
were no Mortuaries due before this Act by
any Law, but by Custom only; by reason
of the words in the Statute of *Circumspecte*
Agatis, which are, *ubi mortuarium dare con-*
suevit, &c.

This

This duty was formerly only suable for Spelm. Rem. in the Court Christian, but now I conceive 115. contra. an Action of Debt will lie at Common Law upon this Statute, for though this Statute is only negative, that they shall not take above such Rates, yet it implies an affirmative, as the Statute of 2 E. 6. for barren Grounds, and the Statute for the Sheriffs Fees and other Statutes. Sanderf. de oblig. Conscient. Prelect. 6. §. 18. fol. 167. contra.

But if a Suit be commenced for a Mortuary in the Spiritual Court, no Prohibition shall be granted to stay their Proceeding there, unless they proceed contrary to the Statute. Jeoffries vers. Wood. Hill. 22. and 23 Car. 2. B. R.

For those Mortuaries that Prelates anciently paid to the Kings of this Realm, I shall not trouble the Reader, but refer those that are curious to inform themselves, to Sir Edw. Coke's Commentary upon Magna Charta, and his Jurisdiction of Courts. Mortuaries to the King by Bishops. 2 Inst. 491. 4 Inst. 338.

In the 10th of H. 4. a Vicar claimed a Mortuary by Custom, and not by the Canon, or any other Law, *quod nota*. 10 H. 4. 1. b.

These Mortuaries are in some places called coarse Presents, or coarse Presentees, as Doctor Cowel says, because where due, they used to pay them before the Coarse was buried, when it was brought to be buried. Their Names.

The Bishop of Chester claimed by Custom upon the death of any Priest, dying within the Archdeaconry of Chester for a Mortuary, his best Horse or Mare, saddle, Bridle and Spurs, his best Gown, a cloak, his upper Garment next it, his best hat, his Tippet, his best Signet or Ring, and Cro. Car. 237. 238. Bishop of Chester his demand as Archdeacon of Chester.

and this Custom was denied by the Plaintiff in a Prohibition, but what the Success was I have not heard; but the Mortuaries due to the Archdeacon of *Chester* are excepted; and the Bishop of *Chester* holds that Archdeaconry, as I have been informed, in the nature of a *Commendam*, and executes it by a Deputy.

Office of Executor.
Lib. 6. §. 16.

Mr. *Swinborn* is of Opinion, That these Mortuaries are to be paid out of the decedents part of the personal Estate where the Wife and Children are to have their reasonable part; the reason he gives is, because Mortuaries are of the nature of Legacies. But I must confess I am not of his Opinion; for I look upon it as a Debt, or Duty, to which the personal Estate is subject. See *Stillingfleet's Eccl. Cases*, 246.

C H A P. XXV.

How Tythes are to be paid in London.

Tythes in London, how to be paid.

Hosienſis c.
Omnis Chriſti-
anus.

THE Livelihood of the Secular Clergy in London conſiſted heretofore chiefly in voluntary Offerings and perſonal Tythes, which little differ from voluntary Offerings. For though a great Doctor tell us that
In præcipuis feſtivitatis tenetur quis offerre, & cogi poteſt, maxime cum ſit quaſi generalis conſuetudo ubique terrarum, &c.

And

And if you ask him which are those Feasts at which the People are bound to offer, he tells you, *Dies dominicos, & dies festivos.* Idem de Paroc. Sect. In quibus, &c.

But there being no Canon or Law that prescribes any certainty in the quantity, value or things to be offered, I can give them no properer a Name than voluntary or free-will Offerings. Vid. Selden de Dec. Pref. 8.

But no sooner was Popery abolished in this Nation, but these voluntary Offerings and personal Tythes soon came to little. And notwithstanding it was enacted by the Statute of 2 E. 6. That all that by Law or Custom were bound to make their Offerings should thenceforth pay them to the Parson, &c. yet that did not much amend the matter, so that the maintenance of the Secular Clergy in London was brought to a very low ebb, there being no Tythe, as hath been said, chargeable upon Houses, unless by way of a *Modus decimandi*, whereupon the Clergy of London in the 37th year of the Reign of King H. 8. made their application to the Parliament, and obtained an Act of Parliament for the confirming a Decree made by the Archbishop of Canterbury, and divers other great Lords of the Kingdom, to settle the matter, the effect whereof follows, which is printed amongst the other Acts of Parliament. Stat. 37 H. 8. c. 12.

I. 'That the Citizens of London from thenceforth for ever, shall pay yearly without fraud or guile to their Parsons, &c. for the time being, for every ten shillings rent of all Houses,

' Houses, Shops, Ware-houses, Cellars and
' Stables, within the said City of London,
' and the Liberties of the same, 16 *d. ob.* and
' for every 20 *s.* Rent 2 *s.* 9 *d.* and so ascen-
' ding for every 10 *s.* Rent.

2. ' That if any Dwelling-houses, Shops,
' &c. should be leased by fraud or covin,
' reserving less Rent than hath been ac-
' customed ; or shall by reason of fine, or
' by fraud or covin, make any Lease without
' reserving any Rent, than the Farmer or
' Tenant shall pay after the same rate, the
' said House, &c. was last let for without
' covin ; but note, that if the House, &c. be
' let at as great a Rent, as the same was set
' at the time of the making of the said Sta-
' tute, then no fraud can be averred, al-
' though a Fine or Incom was given for the
' said Lease.

2 Inst. 659.

3. ' That if a House, &c. be leased, and no
' Rent at all reserved, then such House, &c.
' shall pay such rate as the same was let for at
' the time of the making of the said Statute ;
' but where greater Rent is reserved, it is to
' pay according to the best improved value.

2 Inst. 660.

Lit. Rep. I 41.
ib.

' But where Houses had been always held
' by the Owners, and by consequence, no
' Rent paid, that is *casus ommissus* in this Sta-
' tute, and such Houses will be free'd of pay-
' ment of Tythes by this Law.

Lit. Rep. ubi
supra.

' But if it were a House that yielded Rent
' at the time of the making the Decree, and be
' now let without Rent, it shall pay Tythe
' according to the Rate it was set for at the
' making of the Decree, although no Fine
' at all were paid for such Lease.

5. ' Th

5. 'The Tythes upon this Decree cannot
'be sued for in the Ecclesiastical Court, be-
'cause the Act it self declares how they shall
'be recovered.

6. 'That if the Owners held the Houses
'themselves, then they shall pay Tythe after
'the rate the same were set for at the time
'of the Decree.

7. 'That if any person take any House, &c.
'by Lease, and he and his Executors, &c. live
'in part of it, and set out part, the principal
'Farmer or Taker, his Executors, &c. shall pay
'their Tythes for his and their parts after the
'rate aforesaid, and of such parts as is farmed
'out according to the rate it is set at. And
'in the same manner Tythes are to be paid,
'where one takes a Lease of several Houses,
'and lets out part, and holds any part himself.

8. 'That if any Farmer, or his Assigns,
'shall farm all the Houses, &c. so farmed to
'one or divers Tenants, the Tenants shall
'pay Tythes according to the Rent reserved.

9. 'That if Dwelling-houses shall be con-
'verted into Warehouses, or *à converse*, yet
'they shall pay Tythe according to the
'Rate aforesaid.

10. 'That if a Dyehouse or Brewhouse be let
'with the Implements, then a third penny of the
'Tythes after the rate aforesaid to be abated.

11. 'That where a Mansion-house with
'Shops, Stables, Wharfs with Crane, Tim-
'ber-yard or Gardens belonging to the
'same, and occupied together, shall after-
'wards be severed, or were severed within
'eight years before the decree, that then the
'Farmers of the Shops, Stables, &c. shall pay
'Tythes according to the Rate aforesaid.

A a

12. 'That

The Parsons Counsellor : Part II.

12. ' That these Tythes shall be paid
' Quarterly, at *Easter, Midsummer, Michael-*
' *mas and Christmas.*

13. ' That any Householder, that holds
' an House of 10 s. Rent, or above, shall be
' acquit of his Offerings; but his Wife, Chil-
' dren and Servants, shall pay 2 d. yearly for
' their four Offering days receiving at *Easter.*

14. ' That if any House of 10 s. Rent, or
' above, shall be let by parcels under 10 s.
' Rent, then the Owner, if he live in any
' part of the House, or the Chief Tenant, shall
' pay the Tythe after the rate as the same
' House was accustomedly letten before such
' division, and the Subtenants, that hold less
' than 10 s. *per ann.* without fraud or covin,
' shall pay 2 d. yearly for their Offerings.

15. ' That no Tythe shall be paid for any
' Gardens belonging to any Mansion-house,
' and which are held for pleasure; but if such
' Garden contain half an Acre of Ground
' or more, and shall make any yearly profit
' by Sale, then the same to be paid for, ac-
' cording to the rate abovesaid.

16. ' This Act is not to extend to the
' Houses of Noblemen or Noblewomen,
' whilst they are kept in their own hands,
' and not let for Rent, and w^{ch} formerly paid
' no Tythe, so long as the same continue un-
' letten, nor to the Halls of any Craft or
' Companies so long as the same are unlet-
' ten, and in times past paid no Tythes.

17. ' That Sheds, Stables, Cellars, Timber-
' yards and Tenter-yards, which never were
' parcel of, or belonging to any Dwelling-
' house, and which have not been used to
' pay

pay Tythes, shall be acquit of the payment of Tythes, as hath been accustomed.

18. 'But if by Custom any lesser Rate have been paid than the Rate of 2 s. and 9 d. in the pound, then the accustomed Rate only to be paid.

19. 'The Lord Mayor of the City of London, by the Advice of Council, is authorized by the said Act, to hear and determine all differences arising upon this Decree, and give Costs according to the intent thereof.

20. 'That if the Mayor do not make an end of such differences within two Months after complaint; or if any person find himself aggrieved by his Decree, then the Lord Chancellor, within three Months after complaint to him made, shall make an end of the differences with costs, &c.

21. 'That if Rents fall by reason of decay, or burning, to less than they were accustomedly letten, That then the Tythes during such Term, shall be paid according to the Rent reserved.

This is a short abstract of that great Decree, which I have inserted here for the use of the Clergy of that City: I shall only add some other Resolutions upon this Decree, and conclude this Chapter.

In a Case, between Dr. Meadhouse and Dr. Taylor, it was resolved, That Suits for Tythes upon this Decree should be before the Mayor in Writing, and not by Parol. Noy 130.
Where Suits
for Tythes in
London shall be
determined.

2. That a Reservation by a Lessor for Life upon a Lease by him made for years, shall not bind him in Reversion to pay Tythes according to that rate.

3. A Rent for half a year, and after for another half year, is a yearly Rent within this Decree.

Cro. El. 276.
More 912.

It hath been resolved, that Abby-Lands within the City of *London* and the Liberties thereof, are not free'd from the payment of Tythes within the Statute of 31 H. 8. because the Statute and Decree for the payment of Tythes within the City and Liberties of *London* was made after the Statute of 31 H. 8. and their Privileges are not reserved.

Verf. Scudamore.

5 Jac. C. B.
Cro. Jac. 6.
613.

It hath been resolved, that if the Rents be continued as they were at the time of the making of the Statute, though upon new Fines, that the Tythes shall be paid accordingly. But if upon new Fines less Rent be reserved, it shall pay Tythes as it did before.

And if no Rent be reserved, nor Fine paid; the Parson shall have his Tythes according to the Rent at the time of the Decree.

But if a House have always been held by the Owners, and no Rent paid, it shall pay no Tythes within the Decree.

The Decree was inrolled 5 Martii 38 H. 8. although the Inrolment cannot be found.

Infra 382.

And it was resolved, that if the Mayor of *London* shall make any Decree against Law, a Prohibition lies; for the exposition of all Acts of Parliament belongs to the Judges of the Common Law.

And

And it hath been resolved, that though Dr. Burgess
House in *London* stand void without any Parson of
Tenant at all, that yet notwithstanding St. Magnes
shall answer Tythes to the Parson. vers. Symonds.]

And it hath been resolved, that if any Scaccar. M.
suit be brought in the Ecclesiastical Court. 4 Car. 1. per
or any other Court than is directed by the Henden.
Act, a Prohibition lies. 2 Inst. 660.]

Lastly, Where the Decree says (where
no Rent is reserved by reason of any Fine
or Income paid before-hand) that is put
only for Example ; for if no Rent be re-
served for this, or any other cause or con-
sideration, it is within the meaning of this
Clause.

But if any Tythe in *London* be due by Littl. Rep. 102.
Custom, they may be sued for in the Ex-
chequer, notwithstanding the Statute.

And it was held by the Court of Exche. Hardres 116.]
That that Court has Jurisdiction for
Tythes in *London* upon this Statute, because
there is no negative restrictive words in
the Statute.

I cannot tell by what improvidence I An Act of Par-
omit, in all my former Editions of this liament for
book, taking notice of an Act of Parlia- settling Main-
ment made in the 22th and 23th of King tainance upon
Charles the Second, for the better Settle- Ministers of
ment of the Maintainance of the Parsons, the Churches
Archdeacons and Curates in the Parishes of the that were
City of *London*, burnt by the late dread- burnt in Lon-
ful Fire there, which is a Law very neces- don.

sary to be known, by which it is Enacted,
that the annual certain Tythes of all and eve-
ry Parish and Parishes within the said City
London, and the Liberties thereof, whose

Churches have been demolished or in part consumed by the late Fire, and which Parishes by virtue of an Act of this present Parliament, Intituled, An Additional Act for the Rebuilding the City of London, Uniting of Parishes, and Re-building of the Cathedral and Parochial Churches within the City of London, remain and continue single as heretofore they were or are by the said Act Annexed or United into one Parish respectively, shall be as follows, that is to say, The annual certain Tythes or Sums of Money in lieu of Tythes.

	l.	s.	d.
<i>Of the Parish of Alhallows</i>			
<i>Lombard-street</i>	110	00	00
<i>Of St. Bartholomew Exchange</i>	100	00	00
<i>Of St. Bridget alias Brides</i>	120	00	00
<i>Of St. Bennet Finck</i>	100	00	00
<i>Of St. Michael Crooked-lane</i>	100	00	00
<i>Of St. Christopher</i>	120	00	00
<i>Of St. Dionis Back-church</i>	120	00	00
<i>Of St. Dunstan in the East</i>	200	00	00
<i>Of St. James Garlick-hithe</i>	100	00	00
<i>Of St. Michael Cornhil</i>	140	00	00
<i>Of St. Michael Bassishaw</i>	132	11	00
<i>Of St. Margaret Lothbury</i>	100	00	00
<i>Of St. Mary Aldermanbury</i>	150	00	00
<i>Of St. Martin Ludgate</i>	160	00	00
<i>Of St. Peter Cornhil</i>	110	00	00
<i>Of St. Stephen Coleman-street</i>	110	00	00
<i>Of St. Sepulchre</i>	200	00	00
<i>Of Alhallows Bred-street and</i>			
<i>St. John Evangelist</i>	140	00	00
<i>Of Alhallows the Great, and Al-</i>			
<i>hallows the Less</i>	200	00	00

	l.	s.	d.
Of St. Alban Woodstreet and St. Olave Silver-street	170	00	0
Of St. Ann and Agnes, and St John Zachary	140	00	0
Of St. Augustine and St. Faith	172	00	0
Of St. Andrew Wardrobe and St. Ann Black-Friars	140	00	0
Of St. Antholin and St. John Baptist	120	00	0
Of St. Bennet Grace-church and St. Leonard East-cheap	140	00	0
Of St. Bennet Pauls-Wharf and St. Peters Pauls-Wharf	100	00	0
Of Christ-church and St. Leo- nard Foster-lane	200	00	0
Of St. Edmond the King and St. Nicholas Acons	180	00	0
Of St. George Botolph lane and St. Botolph Billingsgate	180	00	0
Of St. Lawrence Jury and St. Magdalen Milk-street	120	00	0
Of St. Magnus and St. Marga- rets New Fish-street	170	00	0
Of St. Michael Royal and St. Martin Vintry	140	00	0
Of St. Matthew Friday-street and St. Peter Cheap	150	00	0
Of St. Margaret Pattens and St. Gabriel Fenchurch	120	00	0
Of St. Mary at Hill and St. An- drew Hubbard	200	00	0
Of St. Mary Woolnoth and St. Mary Woolchurch	160	00	0
Of St. Clement Eastcheap and St. Martins Orgars	140	00	0

	l.	s.	d.
Of St. Mary Abchurch and St. Lawrence Pountny	120	00	0
Of St. Mary Aldermary and St. Thomas Apostles	150	00	0
Of St. Mary le Bow, St. Pan- cras Soper-lane, and Alhal- lows Hony-lane	200	00	0
Of St. Mildred Poultry and St. Mary Cole-church	170	00	0
Of St. Michael Wood-street and St. Mary Staining	100	00	0
Of St. Mildred Bred-street and St. Margaret Moles	130	00	0
Of St. Michael Queenhith and Trinity	160	00	0
Of St. Magdalen Old Fish- street and St. Gregory	120	00	0
Of St. Mary Sommerset and St. Mary Mounthaw	110	00	0
Of St. Nicholas Coleabby and St. Nicholas Olives	130	00	0
Of St. Olive Jewry and St. Martin Ironmonger-lane	120	00	0
Of St. Stephen Walbrook and St. Bennet Sherehogg	100	00	0
Of St. Swithin and St. Mary Bothaw	140	00	0
Of St. Vedast alias Fosters and St. Michael Quern	160	00	0

*Which respective Sums of Money to be paid in
lieu of Tythes within the said respective Pa-
rishes and assent as herein after is directed, shall
be and continue to be esteemed, deemed and
taken to all intents and purposes to be the*

respective certain annual maintainance (over and above Glebes and Perquisites, Gifts and Bequests to the respective Parson, Vicar and Curate of any Parish for the time being, or to his or their respective Successors, or to other persons for his or their use) of the said respective Parsons, Vicars and Curates, who shall be legally instituted, inducted and admitted into the respective Parishes aforesaid.

And that the said several Sums of Money for Tythes may be more equally assessed upon the several Houses, Buildings, and all other Hereditaments whatsoever, within all the said respective Parishes. Be it Enacted, &c. That the Alderman of such respective Ward or Wards within the said City, wherein any of the said Parishes lie, and his and their Deputy and Deputies, and the Common-Council-Men of such respective Ward or Wards, with the Church-wardens and one or more of the Parishioners of such respective Parish wherein the Maintainance aforesaid is respectively to be assessed, to be nominated by such respective Alderman, Deputy, Common-Council-Men and Church-wardens, or any five of them, whereof the Alderman or his Deputy to be one, shall at some convenient and seasonable time before the twentieth day of May, in the year of our Lord One thousand six hundred seventy one, assemble and meet together in some convenient place within every of the respective Parishes, in such respective Ward wherein the maintainance aforesaid is to be assessed, and they or the major part of them so assembled, shall proportionably assess upon all Houses, Shops, Warehouses and Cellars, Wharfs, Keys, Cranes, Waterhouses (which

By whom and how the said Assessment shall be made.

The Parsons Counsellor : Part II.

(which Waterhouses shall pay in their respective Parishes where they stand and not elsewhere) and Tofts of ground (remaining unbuilt) and all other Hereditaments whatsoever (except Parsonage and Vicarage Houses) the whole respective Sum by this Act appointed, or so much of it as is more than what each Impropiator is by this Act enjoyned respectively, to allow in the most equal way that the said Assessors, according to the best of their Judgments can make it, which said Assessments shall be made and finished before the 24th day of July then next ensuing.

How unequal
Assessments
shall be re-
lieved,

And be it farther Enacted by the Authority aforesaid, That if any variance or doubt shall happen to arise about any Sum so assess as aforesaid, or that any Parishioner or Parishioners, Owner or Owners of any House, Shop, Warehouse or Cellar, Wharf, Key, Crane, Waterhouse, Toft of Ground or other Hereditament, within any of the said Parishes, shall find himself or themselves aggrieved by the assessing of any Sum or Sums of Money in manner and form aforesaid, that then upon complaint made by the Party or Parties agrieved, to the Lord Mayor or Court of Aldermen of the said City, within fourteen days after notice given to the Party or Parties assess, of such assessment made, to the said Lord Mayor and Court of Aldermen, summoning as well the Party or Parties aggrieved as the Alderman and such other as made the said assessment, shall hear and determine the same in a summary way, and the Judgmet by them given shall be final, and without Appeal.

The Assessment
may be review-
ed and laid
again.

Provided that any assessment or rate to be made or laid by virtue of this Act, shall and may in all or any of the Parishes aforesaid, in
like

like manner be reviewed or altered or laid again within three months after the twenty fourth day of June, 1674. according to the aforesaid rules, and any such assessment or rate shall or may be again reviewed or reassess within three months after the twenty fourth day of June, in the year of our Lord, 1681. And that all and every such new assessment and rate shall be liable to the like Appeals as aforesaid, and shall be collected, lewied and paid as any other assessment or rate mentioned in this Act may or ought to be.

And if the said Alderman, Deputy, Common-Council-men and Parishioner or Parishioners so appointed as aforesaid, shall, after summons and request made in that behalf unto them, by the Lord Mayor and Court of Aldermen, or the Incumbent or Incumbents of any of the said respective Parish or Parishes, refuse and neglect to meet and make such assessments, as aforesaid, then it shall and may be lawful to and for such person and persons as shall be thereunto authorized and required by the said Lord Mayor and Court of Aldermen to make such assessment as by the said Aldermen, Deputy, Common-Council-men, Churchwardens, Parishioner or Parishioners aforesaid, should or ought to have been made.

How unequal Assessment shall be relieved in default of the Lord Mayor and Court of Aldermen.

And be it farther Enacted, &c. That the said Assessors within ten days after such assessment made, and the respective Appeals (if any be) determined, shall make three Transcripts thereof in Parchment, containing the respective Sums to be payable or appointed to be paid out of all and every the Premisses within (uch respective Parish, and subscribe the same under their

There shall be three several Transcripts of the Assessments, and how to be disposed.

their Hands, within twenty days after such subscription, as aforesaid, one of the said Transcripts shall be returned to the Lord Mayor of the City of London, to be kept and preserved by the said Lord Mayor, in and amongst the Records of the said City, for a perpetual Memorial thereof, and another of the said Transcripts shall be returned into the Registry of the Lord Bishop of London, to be kept and reserved as aforesaid, and the other of the said Transcripts shall remain and be kept in the Vestry of such respective Parish, for a perpetual Memorial, as aforesaid.

Where and to
whom the said
Monies aforesaid
shall be paid.

And for the surer and better payment of the said respective Sums of Money, so to be assessed and taxed towards the raising of the said maintenance of their respective Parsons, Vicars and Curates of the said respective Parishes, as aforesaid. Be it Enacted, &c. That all and every such respective Sum and Sums of Money, so to be assessed and taxed as aforesaid, towards the raising of the said maintenance of the said respective Parsons, Vicars and Curates of the said respective Parishes, shall be paid to the said respective Parsons, Vicars and Curates and their Successors respectively, at the four most usual Feasts, (that is to say) at the Annunciation of the blessed Virgin Mary, the Nativity of St. John Baptist, the Feast of St. Michael the Archangel, and the Nativity of our blessed Saviour, or within fourteen days after each of the Feasts aforesaid, by equal payments; the respective payments thereof to begin and commence only from such time and times as the Incumbent or Incumbents of such respective Parish shall begin to Officiate or Preach as Incumbent

bent or Parson in the respective Church belonging to such respective Parish, or in some other convenient place or places in such respective Parish or Parishes, to be nominated or appointed by the Lord Bishop of London for the time being, or by the Archbishop of Canterbury in any place within his Peculiars.

And in any Parish or Parishes where any Improvements be, be it enacted, &c. That all and every the Impropiator or Impropiators of any of the said Parishes, shall pay and allow what really and bona fide they have used, and ought to pay and satisfy to the respective Incumbent of such respective Parish, at any time before the late Fire, and the same shall be esteemed and computed as part of the Maintenance of such Incumbent; notwithstanding this Act, or any Clause, or Matter, or Thing therein contained.

What Impro-
priators shall
pay towards
this Charge.

And be it farther enacted, &c. That if any of the Inhabitants in any of the respective Parish or Parishes as aforesaid, shall, or do refuse or neglect to pay to the respective Incumbents aforesaid, of any of the respective Parishes, any Sum or Sums of Money to him respectively payable, or appointed to be paid by this Act, or any part thereof, contrary to the true intent and meaning of this Act, (being lawfully demanded at the House or Houses, Wharf, Key, Crane, Cellar, or other Premisses whereout the same is payable) that then it shall and may be lawful to and for the Lord Mayor of the City of London for the time being, upon Oath to be made before him of such refusal or neglect, to give and grant out Warrants for the Officer or Person appointed to collect the same,

The Sums as-
sessed how to be
recovered upon
refusal, &c.

with

with the assistance of a Constable in the day time, to levy the same Tythe or Sums of Money so due, and in arrear and unpaid, by distress and sale of the Goods of the Party or Parties so refusing or neglecting to pay, restoring to the Owner or Owners the overplus of such Goods over and above the said arrear of the said Monies so due and unpaid, and the reasonable Charges of making such Distress, which he is to deduct out of the Monies raised by sale of such Goods.

What remedy if the Lord Mayor or Court of Aldermen neglect or refuse to do their Duties.

Provided always, &c. That in case the Lord Mayor or Court of Aldermen shall refuse or neglect to execute any of the respective powers to them by this Act granted, or to perform all and every such thing related either to the assessing or levying of the respective Sums aforesaid, as they are by this Act authorized and required to perform, that then it shall and may be lawful for the said Lord Chancellor, or Lord Keeper of the great Seal of England for the time being, or any two or more of the Barons of his Majesty's Court of Exchequer, by Warrant or Warrants under his or their respective Hands and Seals, to do and perform what the said Lord Mayor and Court of Aldermen, according to the true intent or meaning of this present Act, might or ought to have done, and by such Warrant either to empower any person or persons to make the respective Assessments as aforesaid, or to authorize the respective Officers or person or persons appointed to collect the Sums aforesaid, to levy the same by distress and sale of the Goods of any person or persons that shall refuse or neglect to pay the same in manner and form aforesaid.

Provided

Provided always, &c. That where any of the Parishes within the said City, have since the late Fire, by Death or otherwise, become vacant, the surviving or remaining Incumbent of the other Parish thereto united, or therewith consolidated, shall have and enjoy, and have like remedy to recover the Tythes hereby settled to be paid, as if he had been actually presented, admitted, instituted and inducted into both the said Parishes since the Union and Consolidation thereof.

Where one of the Incumbents dies his fellow shall have his part.

Provided, That no Court or Judge Ecclesiastical or Temporal, shall hold Plea of, or for any the Sum or Sums of Money due and owing, or to be paid by virtue of this Act, or any part thereof, other than the persons hereby authorized to have Cognizance thereof: Nor shall it be lawful to or for any Parson, Vicar, Curate or Incumbent to convent or sue any person or persons assent as aforesaid, and refusing or neglecting to pay the same in any Court or Courts, before any Judge or Judges, other than what are authorized and appointed by this Act for the bearing and determining of the same in manner aforesaid.

These Assessments not to be sued for in any other Court.

Provided always, That it shall and may be lawful to and for the Warden and Minor Canons of St. Pauls Church London, Parson and Proprietors of the Rectory of the Parish of St. Gregory aforesaid, to receive and enjoy all Tythes, Oblations and Duties, arising or growing within the said Parish in as large and beneficial manner as formerly they have or lawfully might have done, any thing therein to the contrary notwithstanding.

The Warden and Minor Canons of St. Pauls to enjoy the Rectory of St. Gregory.

CHAP. XXVI.

The Twenty sixth Chapter shews, in what Court the Right of Tythes is determinable, and how, and in what manner to be recovered; and in what Cases Prohibitions are usually granted, and how prosecuted and defended.

2 Inst. 661.
490.
Seld. Hist. de-
cim 412. Lamb.
Saxon Laws 45.

Selden Jani An-
glorum 76. 77.
Daltons Sheriff
410, 411.

Seld. 414.

Seld. 414, &c.

THAT Tythes were anciently deter-
minable in the County and Hundred
Courts, is asserted both by Sir Edward
Coke and Mr. Selden: And the same ap-
pears by the Laws of King *Ethelstan* long
before the Conquest; and Mr. Selden is
of Opinion, that the Bishops Consistory
here in England was not settled till the time
of *William the Conqueror*, who by his
Charter commands, *Ut nullus Episcopus vel*
Archidiaconus de legibus Episcopalibus amplius
in Hundredo placita teneant, nec causam qua
ad regimen animarum pertinet ad judicium se-
cularium hominum adducant, sed quicunque
secundum leges Episcopales de quacunque causa
vel culpa interpellatus fuerit, ad locum, quem
ad hoc Episcopus elegerit & nominaverit, ve-
niat, ibique de causa sua respondeat, & non
secundum Hundret. sed secundum Canones &
Leges Episcopales rectum Deo & Episcopo
faciat. And closes thus, *Hoc etiam defendit*
ut nullus Laicus homo de legibus, quæ ad Epi-
scopum pertinent se intromittat; yet notwith-
standing, as Mr. Selden observes, the Juris-
diction

dition of Tythes was not so settled in the Bishop and Ecclesiastical Courts, but there were Suits for Tythes as well in the Temporal as Ecclesiastical Courts, whereof he gives some Instances. And amongst the Laws of King H. 1. I find this Clause, *Si quis rectam decimam superteneat, vadat præpositus Regis & Episcopi & terræ domini cum presbytero, & ingratum auferant; & Ecclesiæ cui pertinebit, reddant, & nonam partem relinquunt ei qui decimam dare noluerit.* Leg. H. 1. c. 11. Lamb. 182.

But the Law hath been now long settled that the Ecclesiastical Courts have in some Cases the power to determine the Right of Tythes, and in all Cases to hold Plea for the Substraction and withholding of Tythes, and confirmed by several Acts of Parliament.

To the first, If a dispute happen between two Parsons, to which of them the Tythes belong, whether to the one by Parochial Right, or the other as a Portion belonging to his Rectory by prescription, and both Parsons claim by Presentation under the same Title, so that the Right of Patronage comes not in dispute, the Right of these Tythes shall be determined in the Ecclesiastical Court, and no Prohibition or *Indicavit* shall hinder it; and this Suit in the Ecclesiastical Court is called a Spoliation. 35 H. 6. 30. 38 H. 6. 22. per Fortescue. Where the Spiritual Court may determine the Right of Tythes.

And this Jurisdiction is so peculiar and annexed to the Spiritual Courts, That if the one Parson should bring an Action of Trespass at the Common Law against the other Parson, for the taking or carrying away 38 H. 6. 21. 5 H. 5. 40. 14 H. 4. 17. a. b. Where the Temporal Courts have no Jurisdiction of Tythes.

away Corn or other things set out for Tythe, the Defendant may by way of Plea shew, That the Goods in question were Tythes set forth and severed from the nine parts, and that he is Parson of *Dale*, and that he and all his Predecessors time out of mind have had these Tythes as a Portion which belonged to his Church, and that the Plaintiff being Rector of the Parish where they grew, claims them as his Tythes, and demand Judgment, if the King's Court will hold Plea; by such Plea the King's Court shall be ousted of Jurisdiction: But if the dispute in such Action fall out in pleading to be about the bounds of the Parishes, then the King's Courts shall not be ousted of Jurisdiction.

* 5 H. 6. 19.

50 E. 3. 20.

38 E. 3. 6.

39 E. 3. 23.

5 H. 5. 10.

1 H. 6. 5.

44 E. 3. 39.

20 H. 6. 17.

2 H. 4. 15.

31 H. 6. 11.

2 E. 4. 15.

* And so it is, if the question be between the Farmer, Bailly or Servant, of the one Parson, and the Farmer, Bailly, &c. of the other, or the other Parson himself; in such Cases, though the dispute does appear to be concerning the Right of Tythes between the Parsons, yet the Court shall not be ousted of the Jurisdiction because they are not both Clergy-men.

But in all these Cases where the Right of Tythes is in dispute between one Parson and another, in whose Names soever the Suit is in the Spiritual Court, I perceive no Prohibition lies, if both Parsons come in by the same Title of Patronage, so that the Right of Patronage came not in dispute.

And

And I take the Law to be the same where the Question arises between the Parson who is Patron, and the Vicar, Whether Tythes belong to the Parson or Vicar.

But where the Right of Tythes is controverted between two Clergy-men which come into their Churches by several Patrons, there in that case the Spiritual Court hath not Jurisdiction to determine the right of the Tythes, if they amount to the fourth part of the yearly value of the Church; but the Title is to be determined by Writ of Right of Advowson of Tythes, as shall be shewed more at large, when I shall come to shew in what Cases the right of Tythes is determinable in the King's Court. But in that Case, if the Tythes in question do not amount to the fourth part of the yearly value of the Church, the Ecclesiastical Court may determine the right in a Spoliation.

But it should seem that if they claim both by one Patron there, though the whole Tythes come in debate, the Title shall be determined in the Spiritual Court by a Suit in the nature of a Spoliation.

But the Jurisdiction of the Ecclesiastical Courts to hold Plea for the subtraction and withholding of Tythes, as the same hath been very ancient, so it hath been confirmed by several Acts of Parliament, as I shall shew; the first of which is that of *Circumspecte Agatis* made in the ninth Year of E. 1. by which it is Enacted, That, Si Rector petat versus parochianos oblationes &

40 E. 3. 28.
35 H. 6. 39.
Noy 147.
More 907.
West. 2. c. 5.

Circumspecte Agatis, Articuli Cleri, c. 2.

Where the Spiritual Court cannot determine the right of Tythes.

F.N.B. 37 E.

Spiritual Jurisdiction confirmed by several Acts of Parliament.

By the Statute De circumspecte Agatis.

decimas debitas & consuetas; vel si rector petat versus Rectorem de decimis majoribus vel minoribus, dummodo non petatur quarta pars valoris Ecclesie: Item si Rector petat mortuarium in partibus ubi mortuarium dari consuevit: Item si Prælati alicujus Ecclesie vel advocatus petat à Rectore pensionem sibi debitam, omnes hujusmodi petitiones sunt faciendæ in Foro Ecclesiastico, &c. and concludes, In omnibus prædictis casibus habet Judex Ecclesiasticus cognoscere, Regia prohibitionem non obstante.

That it is an Act of Parliament.

2 Inst. 487.
Seld. Hist. decim 424.

And extends to all England.

2 Inst. 487.
Seld. Tythes 413. Flo. 36 b.
Harton of Statutes 15. 17.

40. 41.
Co. 1 Inst. 366. b.

Observations in the penning of it.

There hath been some question made, whether this were an Act of Parliament or not; but it is proved by Sir Edward Coke, by many unanswerable Reasons, to be an Act of Parliament, and so agreed by Mr. Selden, and almost all others.

Secondly, Admitting it to be an Act of Parliament, it hath been doubted, whether it extended farther than to the Diocese of Norwich, it seeming to be appropriated by the penning to that Diocese alone; but by the general Opinion of the Learned, it extends to all other Diocesses, and Norwich is only put by way of Example.

And the prudent penning of this Law by our Ancestors deserves the Reader's Observation, how careful they were to preserve their own Rights, and avoid the incroachments of the Clergy, who were in those days very powerful: For first, they would not give way to the Canons to destroy their Customs and Prescriptions allowed by the Common Law, and therefore give the Spiritual Judge jurisdiction of Tythes and Oblations (*debitas & consuetas*) only.

2. They

2. They would not expose their Rights of Patronage to the determination of the Spiritual Judge, and therefore this condition is annexed, *Dummodo non petatur quarta pars valoris Ecclesiæ.*

3. Lastly, They would not subject themselves to pay Mortuaries according to the Canon Law, but *ubi dare consuevit*; so that if any Suit were sued for Tythes, Offerings, Mortuaries, not due as well by Custom as Common Law, a Prohibition lay and doth lie at this day.

The second Statute concerning the Jurisdiction of the Spiritual Courts in case of Tythes, is the Statute of *Articuli Cleri*, but I shall pass it by here till I come to speak of the Writ of *Indicavit*.

The next Statute I meet with that concerns this matter, is the Statute of 18 E. 3. cap. 7. which I shall pass by also till I come to the determination of the right of Tythes by *Scire Facias*.

There was another Statute made 1 R. 2. 1 R. 2. cap. 13. it is cap. 13. for the Punishing of such as indicted those that sued in the Spiritual Courts for subtraction of Tythes, or compelled them to desist by Bonds or otherwise; but that Law being now become obsolete, and besides my purpose, I shall proceed to the Statute of 27 H. 8. by which it is Enacted,

‘That every Subject of *England, Ireland, Wales, Callais*, and the Marches of the same, should according to the Ecclesiastical Laws & Ordinances of the Church of *England*, and after the laudable Usages and Customs of the

The Parsons Counsellor: Part II.

' Parishes or other places where he dwells or
 ' occupies, shall yield and pay his Tythes and
 ' Offerings, and other Duties of holy Church;
 ' and that for Subtraction of such Tythes,
 ' &c. may by due Process of the King's Eccle-
 ' siastical Law, convent the person, &c. so of-
 ' fending, before his Ordinary or other com-
 ' petent Judge, &c. having Authority to hear
 ' and determine the Right of Tythes, &c. And
 ' compel the Party offending to do and yield
 ' their Duties in that behalf. And in case the
 ' Ordinary, &c. for any Contempt, Contruma-
 ' cy, Disobedience, or other Misdemeanor of
 ' the Party Defendant shall make informa-
 ' tion to any of the King's most Honourable
 ' Council, or the Justices of the Peace of the
 ' Shire where the Offender dwells, to assist
 ' and aid the Ordinary, &c. and to order and
 ' reform any such person, in any Cause before
 ' rehearsed, that then he of the King's Coun-
 ' cil, or such two Justices of the Peace, where-
 ' of one to be of the *Quorum*, to whom such
 ' Information or Request shall be made, shall
 ' have power to attach, or cause to be attach-
 ' ed the person, or, &c. against whom such
 ' Information shall be made, and to commit
 ' the same persons to Ward, there to remain
 ' without Bail or Mainprise until he, &c. shall
 ' have found sufficient Surety to be bound
 ' by Recognizance or otherwise, before the
 ' King's Counsellor, or, &c. or any other like
 ' Counsellors, or Justices, &c. to the use of the
 ' King, to give due Obedience to the Process
 ' and Proceedings, Decrees and Sentence of
 ' the Ecclesiastical Court wherein such Suit,
 ' &c. shall depend or be. And farther gives
 ' power

power to the said Counsellor, or to two Justices of the Peace, whereof one to be of the *Quorum*, to take, receive and record such Recognizance and Bonds.

There is a *Proviso* in this Act, that it shall not extend to *London*.

And another *Proviso*, that the Party sued may have all legal Defences, Appeals and Prohibitions.

And it is to be observed that this Law *Observations* extends to all sorts of Tythes, mixt and *upon this Law* personal, as well as predial.

Next he that will have the benefit of this Law, must sue for the single Value, and not for the double Value upon the Stat. of 2 E. 6.

Thirdly, The Plaintiff in the Ecclesiastical Court may proceed upon this Act for Contempt, Contumacy or Misdemeanor, as well before as after Sentence.

Fourthly, The Security upon this Act may as well be by Bond as Recognizance.

Lastly, Observe the wary penning of this Act; they must pay their Tythes and other Church Duties, according to the Ecclesiastical Laws and laudable Customs and Usages of the place; next if it be demanded before whom Suit upon this Statute shall be made, it is answered by the Statute it self, it must be before such Judge as hath Jurisdiction of the Cause, so that it creates or enlarges no Jurisdiction.

The next Act of Parliament concerning this matter is the Statute of 32 H. 8. by 32 H. 8. c. 7. which it is enacted, that all and singular persons, &c. shall fully, truly and effectually divide, set out, yield or pay all and singular

Tithes and Offerings, according to the lawful Custom and Usages of the Parishes and Places where, &c. and in case any Person, &c. do detain or withhold any of the said Tithes or Offerings, or any part or parcel thereof, that then the person Lay, or, &c. shall or may convene the person, or, &c. before the Ordinary, according to the Ecclesiastical Laws, &c. and so proceed to Sentence according to the Process and Course of the Ecclesiastical Laws.

And that if any Party appeal against the Judges Sentence, he shall then assess the Costs of his Suit therein before expended, and shall compel the Appellant to pay the said Costs by the compulsory Process and Censures of the said Laws, taking Security of the said Party, to whom the said Costs shall be paid, to repay the same, if the Appeal be adjudged against him.

And if any Person after Sentence definitive given against him, shall obstinately and wilfully refuse to pay their Tithes, or the Sum adjudged, that then two Justices of the Peace, whereof one shall be of the Quorum, shall, &c. upon Information, Certificate, or Complaint to them made by Writing by the said Ecclesiastical Judge, &c. cause the Party refusing to be attached and committed to the next Gaol, there to remain till he, &c. have found sufficient Sureties to be bound by Recognizance or otherwise before the same Justices to the use of the King to perform the said definitive Sentence.

Provided that no Person, or, &c. to be sued or otherwise compelled, to yield, give or pay any manner of Tithes for any Manor, Lands, &c. which by the Laws or Statutes of this Realm are discharged, or not chargeable with, &c. Tithes.

Provided

Provided that this Act shall not extend, or be expounded to give any Remedy, Cause of Action or Suit, in the Courts Temporal against any Person, &c. which shall refuse or deny to set out his or their Tythes, or which shall detain, withhold or refuse to pay his Tythes or Offerings, or any parcel thereof: But that in all such Cases the person or persons, being Ecclesiastical or Lay persons, having cause to demand or have the said Tythes or Offerings, or thereby wronged or grieved, shall take and have their remedy for their said Tythes and Offerings in every such Case in the Spiritual Courts, according to the Ordinance in the former part of the said Act mentioned, and not otherwise, any thing, &c.

1. It appears by the Preamble of this Law, that this Act was particularly designed for the Relief of Impropriators, who before this Act were not capacitated to sue in the Spiritual Courts for the Subtraction of Tythes, and were hard put to it to find any other Relief. *Observations upon this Statute.*

2. Where by the former Act the Party for Contumacy, &c. might be compelled to give Security before Sentence, in this Case of the Lay Impropriators the Party cannot be compelled to give Security till after definitive Sentence.

3. Upon this Law there must be two Sureties at least; upon the former one sufficed.

4. The Security in this, as the former, may be by Bond or Recognizance.

5. Whosoever will have the benefit of this Act, must sue particularly upon this Law

The Parsons Counsellor : Part II.

Law for the single value, and not for the double value upon the Statute of 2 E.6.

6. This Law extends, as the former did, to all manner of Tythes and Offerings.

7. *London* is excepted out of this Act, as it was in the former.

8. This Law only extends to customary Tythes, and not for Tythes due by Canon and Ecclesiastical Laws.

9. This Act only extends to such as shall obstinately and wilfully refuse to perform the Sentence of the Ecclesiastical Judge, and for no other Contempt or Neglect.

10. Lastly, This Act restrains the Suit to the Ecclesiastical Court upon this Statute; otherwise an Action, as should seem, might have been brought at Common Law upon this Statute for not setting forth, &c. of their Tythes.

But divers defects appearing in this Law, especially to the Lay-Impropiators, they obtained a more effectual Law for their purpose in 2 E.6. by which it is enacted,

St. 2 E.6.c.13. *That if any person carry away his Corn or Hay, or other predial Tythes, before the Tythe thereof be set forth, or willingly withdrawn his Tythes of the same, &c. that then upon due proof thereof made before the Spiritual Judge, or any other Judge to whom heretofore he might have made complaint, the party so carrying away, withdrawing, letting or stopping shall pay double the value of the Tenth or Tythe so taken, lost, withdrawn or carried away, over and besides the Costs, Charges and Expences of the Suit in the same, the same to be recovered before the Ecclesiastical Judge according to the Ecclesiastical Laws.*

There

There is a Proviso in this Act, that gives occasion of many Prohibitions to this effect:

That no person shall be sued, or otherwise compelled to yield, give or pay any manner of Tythes for any Manors, Lands, Tenements or Hereditaments, which by the Laws and Statutes of this Realm, or by any Privilege or Prescription are not chargeable with the payment of such Tythes, or that be discharged by any Composition real.

This Paragraph of this Statute as to the double value, extends only to predial Tythes, as Corn, Hay, Wood, Flax, Hemp, Fruit, &c. but for mixt and personal Tythes, there is a Provision after in this Act.

There is also another Proviso in this Statute as in the former, which restrains all Suits for subtraction of Tythes to be sued in the Ecclesiastical Court, and that it shall not be lawful to sue any withholder of Tythes, Obventions, &c. in any other Court; and that if the Ecclesiastical Judge shall give Sentence, no Prohibition or Appeal depending, and the Party condemned do not obey the Sentence, that then such Judges may excommunicate the Party, and if he wilfully stand excommunicated by the space of forty days next after Publication thereof, in the Parish-Church of the Place or Parish, where the Party excommunicated is dwelling or most abiding, then the Judge Ecclesiastical may certify the King in the Chancery, and require Process of Excom. capiend.

Extends only to predial Tythes.

Sole Jurisdiction to the Spiritual Courts.

Excommunicate capiende given.

This Clause extends to all manner of Tythes, Offerings, &c. but this gives no double damages for them, as the former Cause doth for Predial Tythes.

There

The Parsons Counsellor : Part II.

There is another Clause in this Act, that gives ground likewise for many Prohibitions, which is to this effect,

That the aforesaid Clause shall not extend to give any Judge Ecclesiastical Jurisdiction to hold Plea of any Matter, Cause or Thing repugnant to, or against the effect, intent or meaning of the Stat. of Westm. 2. c. 5. the Stat. of Articuli Cleri, Circumspecte Agatis, Sylvæ cæduæ, the Treatise de Regia Prohibitione Stat. 1 E. 3. c. 10. or any of them, or to hold Plea in any matter, wherein the King's Court ought to have Jurisdiction, any thing therein, &c.

Note, That by these three Statutes before mentioned, the Jurisdiction of Tythes is confirmed and restrained to the Ecclesiastical Courts.

*Observations
upon all the
Statutes.*

That by the Statute of 27 H. 8. Process for Contempt is given before Sentence.

By that of 32 H. 8. Process for Contempt is given after Sentence definitive: but observe the different penning.

And by this last Statute a Writ of Excommunicato capiendo is given, if the Party continue obstinate by the space of forty days, after an Excommunication published against him; so that a Man would think here were as good Remedies provided for the Recovery of Tythes in the Ecclesiastical Court as could be imagined; but the Interruptions that are frequently given by Prohibitions, as shall be shewed hereafter in due place, very much frustrate the effect of the Proceedings in those Courts.

And

And note, That a *Modus decimandi* is properly to be sued for in the Ecclesiastical Courts; but if the Prescription be denied, it shall be tried in a Prohibition.

2 Inst. 490.
Noy 81.
Hetley 27. 133.
Latch 210.

And so having said so much concerning the Ecclesiastical Jurisdiction for the determining the right of Tythes, and relief against subtraction of Tythes, I shall in the next place shew, in what Courts, in what Cases, and in what Manner, they are determinable in the Temporal Courts.

Mr. *Selden*, in his History of Tythes, reckons up five manner of ways, whereby the right of Tythes may be determined in the Temporal Courts. 1. In Prohibitions, whereby the Spiritual Courts are forbidden to hold Plea, where matters happen which are only tryable at the King's Court, or where those Courts proceed against any Statute or the Common Law, &c. 2. By Writ of Right of Advowson; whereunto may be annexed the Writ of *Indicavit*. 3. By *Scire Facias*. 4. By Process Mandatory to command the payment of Tythes. 5. By Suits and Actions upon the before-mentioned Statute of 27 H. 8. 32 H. 8. and of 2 E. 6. to which may be added the Tryals at Common Law by Actions of Trespass, Assize, &c. and the Proceedings directed by the Statutes 7 and 8 W. 3. c. 6. 10 and 11 W. 3. c. 15. and 7 and 8 W. 3. c. 34. And of these in order.

Selden 422.
In what Cases
the Temporal
Courts have,
and may deter-
mine the Right
of Tythes.

And first of Prohibitions, which are frequently obtained out of the Courts at Westminster, Courts of great Sessions in Wales, and the County Palatines, &c. upon these grounds following.

In what Cases
Prohibitions
used to be
granted.

1. Upon

Hob. 286.

42. 247.

2 Inst. 6. 10.

Co. Entr. 459

d. 460. b.

Co. 2. 44.

Dyer 74. p. 49.

Modus deci-
mandi.Cap. 6. antea
Bounds of the
Parish. Noy

147.

Co. 7. 44. b.

Rols 2. 291.

11, &c.

5 H. 10.

Co. El. 228.

Monastery lands
discharged of
Tythes.

Atkins of

Chancery 43.

Co. Pref. to

4 Rep. 1. b.

Supra 356.

Co. Ent. 450. C.

453. d. Porter;

vers. Rochester.

M. 6 Jac. C. B.

Roll 2. 307.

v. 13.

Suits for things
not Tythable.

1. Upon a *Modus Decimandi*, where the Defendant in the Spiritual Court suggests, that he and all those whose Estate he hath in the Lands, &c. in which, &c. have time out of mind paid so much yearly in Money, or given some other recompence in satisfaction of all the Tythes arising upon the Lands, or of all the Tythe Hay or Corn, &c. this manner of Tything being by Prescription, which is only and properly triable at Common Law, if pleaded in the Spiritual Court or not pleaded, or allowed or not allowed as a good Plea, there is a ground of a Prohibition; and what Prescriptions and *Modus Decimandi* are in this Case approved of by the Common Law, I must refer the Reader to the proper Chapter before.

2. If the Bounds of a Parish come in dispute, whether the place where the Tythes arise be in this or that Parish, this is a matter triable by Jury, and therefore upon a suggestion of this matter a Prohibition will be granted.

3. If Lands be pretended to be discharged of Tythes by the Statute of 31 H. 8. or any other Statute, a Prohibition lies, because it properly belongs to the Judges of the Common Law to expound all Statutes, &c. so if the suggestion be grounded upon the Statute of 2 E. 6. for barren grounds &c.

4. If one sues in the Spiritual Courts for the Tythes of things not Tythable by the Common Law, for which see cap. 12. before, or for the Tythes of great Woods above

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above twenty Years growth, it is a ground for a Prohibition.

No Tythes shall be paid of Hades and Little Rep. 13. Balks in the common Fields, but shall be privileged by the Corn. *Supra 237.*

5. If a Suit be brought in the Spiritual Court for the taking and carrying away of Tythes, after the Tythes are set forth and divided from the ninth part by the Parishioner, unless the Suit be between two Ecclesiastical Persons in their proper Rights, a Prohibition lies, because 'tis matter triable at Common Law. *Roll. 2. 286. f. 4. For matters determinable at Common Law. 38 E. 3. 5. Cro. El. 228. 642.*

6. If the Spiritual Court will not admit a legal defence, as a Release, an Accord with satisfaction, an Award, &c. or if the Spiritual Judge refuse to admit the Defendant to traverse the Plaintiffs Title, that he is not Parson, Vicar, &c. a Prohibition will be granted; but if the Defendant in the Spiritual Court alledge such matter against the Plaintiff there, which is properly triable in that Court, as Simony, &c. in such case no Prohibition will be granted. *Roll. 2. 302. q. 19. 23. 24. v. 16. For irregular proceedings of the Spiritual Courts.*

7. If the Spiritual Court shall disallow the proof of the setting forth of the Tythes by one Witness, Prohibitions have been granted. *Contra. Co. 12. 65. Ideo quare. Cio. El. 666. Roll. 2. 300 q. 6, 8, 9. 301. q. 9. 14, 15. More 909. Hetley 87.*

There are many more Cases wherein Prohibitions have been granted, but these are the most frequent, and may serve for a taste. And indeed Prohibitions are granted in all cases, where they exceed their Jurisdiction. *Disallow proof by one Witness.*

By

2 E 6 c. 13.

Must produce a
Copy of the
Libel.Must prove the
suggestion
within six
Months.

Observations
upon this Clause.
Hoskins verf.
Stroade.
T. 5. Car. 10.
588. B. R.
Cockeram
verf. Davyes.
Hill. 22 Jac.
Poph. 159.
Jones 231.
Cro. Car. 308.
2 Inst. 662.

2 Inst 662.

By the Statute of 2 E. 6. it is Enacted, That no Prohibition shall be granted in matters of Tythes in any of the King's Courts, unless the Party that requires the same, bring and deliver to some of the Court where he prays such Prohibition, a true Copy of the Libel subscribed by the Hand of the Party, and the Suggestion under-written, and that if he do not prove that Suggestion by two honest substantial Witnesses, in the same Court within six Months after the Prohibition granted and awarded, then the Party delayed shall have a Consultation without delay, and double Costs to be assessed by the Court where the Consultation is so granted, to be recovered in an Action of Debt, &c. wherein no Effoin, &c. shall be allowed.

This Clause of this Statute seems to give the Parson, Vicar, &c. a double remedy where the Suggestion is not proved within six Months, that is, a Consultation, and secondly, double Costs; but in both these they are in some measure frustrated in their expectations: For as to the first, after such Consultation a new Prohibition may be obtained; and besides, there are several cases wherein the Party cannot or needs not prove his Suggestion, notwithstanding this Statute, as where the Suggestion is in the negative, which regularly cannot be proved. Secondly, If the Suggestion be grounded upon any matter of Law, as in case the Suit be for things not Tythable, great Wood, things *feræ naturæ*, &c. this appearing in the Libel, a Prohibition lies, and there needs no proof of the Suggestion.

If a Suggestion contain two matters, and the one ought to be proved within six Months, and the other here, though the Party fail in proving that part that ought within this Law to have been proved, yet no Consultation shall in this case be granted.

Gobbe verſ.
Hunt. 5 Jac.
B. R.

A slight Proof will serve in this case; as Noy 28. to say, they have Known it so, or that common Fame is so.

And if the Suggestion be proved before Noy 30. 44. a Judge within the six Months, though not recorded till after; it suffices.

If a Man make an insufficient proof of his Suggestion in a Prohibition, it may be supplied at any time during the six Months within the Statute. Littl. Rep. 185.

To the second, here is double Costs to be awarded for want of proving the Suggestion, and no Execution given, but an Action of Debt to recover it; which is but a bad remedy in this case, when the Party shall only recover the Costs, and have no Costs allowed him in the second Suit.

If a Man have a Prohibition, and do not prove the Suggestion within the six Months, and the Defendant takes issue upon it, which is found against him, in this case the Defendant shall have no Costs. Noy 81.

So upon the whole matter here is a plausible Clause in an Act of Parliament, and little benefit by it.

It is to be observed that some Prohibitions are in themselves peremptory, as where there is a Suit in the Spiritual Court for things not Tythable, and appearing so in

In what case
Prohibitions
are peremptory
in themselves.

the Libel, in which cases a Consultation shall never be granted: And so it is, if the Suit be for carrying away Tythes after they are set forth, unless it be between Clergymen in their own rights: And so it is where the matter is determinable at Common Law, and the same appearing in the Libel.

Where ex post facto.

But where a *Modus decimandi*, a custom of not Tything, a privilege within the Statute of 31 H. 8. for Abby-Lands, and in such other cases, where the Suggestion is grounded upon matter of fact, which is doubtful to the Court, those Prohibitions are not peremptory till the matter of fact be tryed and found true by Verdict.

More 919.

And note, That the Reversioner may have a Prohibition upon a Suit against his Tenant.

But it is a question whether two that are sued severally in the Spiritual Court may be upon the same *Modus* joyned in a Prohibition.

Hetley 147.

The manner of Proceeding in the obtaining, prosecuting and defending of Prohibitions, is in this manner.

How to prosecute and defend Prohibitions.

The Party that is sued in the Spiritual Court, and desires a Prohibition, moves the Court, and for the most part makes his Suggestion *ore tenus* at Bar: If the Suggestion be such upon which a Prohibition cannot be denied, the Court usually gives rule, That the Party shall at a certain day come to shew cause why a Prohibition should not be granted, and that in the interim Proceedings in the Spiritual Court should be stay-

ed.

ed. Upon serving this Rule in due time, and Oath made of it, if the Plaintiff in the Spiritual Court do not appear at the day, and shew good cause to the contrary, the Prohibition is awarded, and the rule made peremptory ; but if the Court be doubtful, whether the matter be sufficient to ground a Prohibition or no, then, or at the Prayer of the Defendant, the Court will order the Plaintiff to draw up his Suggestion into form, and then the Court will consider of the matter, or the Defendant may demur to it, and the matter argued by Learned Counsel, and then the Court, as they see cause, will either award the Prohibition, or discharge the Rule. But if the matter suggested be a good ground for a Prohibition, but is in it self false or doubtful, the Defendant in the Prohibition may demand a Declaration of the Plaintiffs Attorney, which is grounded upon a supposed Attachment, for not obeying the Prohibition ; to which the Defendant may plead as Counsel shall advise him, and Traverse, and put in issue the matter of the said Suggestion, or such other matter as Counsel shall advise, which is to be tryed by a Jury of the Country ; if it pass with the Plaintiff, then is the Prohibition become peremptory ; but if the Verdict pass for the Defendant regularly, a Consultation is awarded, that is, a Writ directed to the Judge of the Spiritual Court, authorizing him to proceed, notwithstanding the Prohibition.

Littl Rep 367.

If a Man be sued in the Spiritual Court for the Tythes of Wood, Herbage, &c. and a Prohibition granted because the Wood was burnt in the House, or the Cattle bred for the Plough or Payl, the Defendant may plead, that the Wood or Cattel were sold, and Traverse the Suggestion.

Hetley 147.

It has been made a Question, Whether two that are sued severally in the Spiritual Court, may joyn in a Prohibition upon the same *Modus*.

St. 50 E. 3. c. 4.
Where a Prohibition may be had after consultation.

Now by a Statute made in the 50 E. 3. it is Enacted, That where a Consultation is once duly granted upon a Prohibition made to the Judge of Holy Church, that the same Judge may proceed in the Cause by virtue of the same Consultation, notwithstanding any other Prohibition thereupon to be delivered; Provided always, that the matter in the Libel of the said Cause be not ingrossed, enlarged, or otherwise changed.

Jones 231.

Cro. Car. 208.

Proph 159. &c.

But this Statute has been several times held to extend to such Causes only where Consultations are judicially granted upon examination of the Cause, and not where they pass of course, as for want of proof of a Suggestion, or upon Nonsuit for want of prosecution, or where the first was granted for want of a Copy of the Libel, or such like.

More 917.

Co. 5. 68. a.

Co. 12. Rep. 44.

Consultations
sub modo.

Sometimes the Court grants a Consultation *sub modo*, as where the matter of the Libel is in the disjunctive, and as to one part the Court has Jurisdiction, and to the other not, there the Court may grant a Consultation as to that part that the Spiritual

tual Court has Jurisdiction of, and let the Prohibition stand as to the other.

Or a Consultation may be granted, so that the Spiritual Court allow such plea, of such proof.

Note, That the six Months for the proof of the Suggestion is according to the Kalender, and not 28 days to the Month.

And note, in the Cases before put, the Prohibition shall be general, and the Consultation special, *quoad*, &c.

And it is taken for a Rule in Sir Henry Hobart's Reports, that if a Prohibition be faulty, yet the Defendant shall never have a Consultation, if it appear to the Court that the Suit in the Ecclesiastical Court was not well grounded.

And therefore where one sued for the Tythe Corn of sixty Acres of Land, and the Defendant suggested it was barren ground, and paid no Tythe, and pray'd and had a Prohibition, and the Jury found that thirty Acre of it were so, and that the other thirty were barren, but had paid Tythe Wool and Lamb, and a Consultation denied, because it appeared the Plaintiff had no cause to sue for Tythe Corn.

So if one lay a *Modus* for the whole Town, and prove it for himself only, no Consultation shall be granted.

So in a Prohibition it was suggested, that the Parson had 20 Acres of Land, and 10 Acres of Wood in discharge of all Tythes, and the proof was, that he had 20 Acres of Land only, and a Consultation denied, because it appeared he had no cause of Suit.

Sommers vers.
Sir R. Bulkley,
T. 32. El. B. R.
Poph. 58.
Hob. 179.
How the six
Months to prove
a Suggestion is
to be accounted.
Co. 3. 68. a. .

Where no Con-
sultation shall
be granted up-
on a Verdict
for the Defen-
dant.
Hob. 300. .
Dyer 171.
P. 51. 6.

Noy 28. .

More 911.
Austen vers.
Pigot. Cro. El.
736.

Prohibition after Sentence.

Hob. 97.

Noy 70.

Winch. 8.

Cre. El. 595.

Hob. 67.

Regularly a Prohibition ought not to be granted after Sentence, unless it appear the Sentence were obtained in the Vacation, or by surprize, so that the Party had not time to pray it sooner, or upon matter arising after the Sentence, and the granting or not granting rests much in the discretion of the Court.

After Consultation.

Hob. 286.

Hughs 245.

Hill. 11 Jac.

C. B.

Baldum vers.

Gerry.

And so sometimes upon new matter arising, after a Consultation a Prohibition may be granted, notwithstanding the aforesaid Statute of 50 E. 3. as where the Spiritual Court after Consultation proceeds to try matter determinable only at Law, or if after a Consultation the Spiritual Court will make an unjust Decree as to award treble damages: And so in all cases if the Spiritual Judge will proceed illegally, and against the Common Law, after Consultation a new Prohibition may thereupon be obtained, but not upon any matter alledged in the Libel.

The vertue and vices of Prohibitions.

Prohibitions of themselves are excellent things, where they are used upon just, legal and true grounds; and have often avoided the Ulurpations of the Popes and Spiritual Courts: But by the Corruption of these later times they are grown very grievous to the Clergy, being too often granted upon feigned and untrue Suggestions, which it is impossible the Judges should foresee without the Spirit of Prophecy. And I think I may presume to say, That where one was granted before Queen Elizabeths time, there have been a hundred granted in this last Age, and they are

very great delay and charge to the Clergy, and it were well, in my poor judgment, if the Reverend Judges would think of some way to restrain them, or to make them pay well for their delay, by making the Plaintiff enter into Recognizance to pay such Costs, as the Court out of which they issue, should Award, in case they should not prove their Suggestion in convenient time, or some such other course as they in their great wisdom shall think just and meet.

And so having done with the first manner of determining the right of Tythes at the Common Law, I shall proceed to the second, which is by Writ of Right of Advowson, to which likewise belongs the Writ of *Indicavit*, which in it self is no other but a meer Prohibition to the Ecclesiastical Judge; and first of the *Indicavit*.

There have been some Opinions, That the Writ of *Indicavit* is grounded upon the Statute of *Circumspecte Agatis* and *Articuli Cleri*, cap. 2. But it is very clear this Writ lay at Common Law; and it appears in our Books, That it was the Opinion of some Learned Judges that it lay in all cases where the right of Patronage might come in dispute, and of this Opinion Sir *Edward Coke* seems to be.

And *Bracton*, a Learned Judge, who wrote in the time of *H. 3.* hath the very Writ in his Book, which was long before the Statutes above-mentioned; and he saith, that this Writ lies, *Si contentio fuerit inter Rectores de aliquibus decimis; quæ aestimari possunt* 38 H. 6. 20. 2. per Moile. 4 E. 3. 27. b per Markham. 2. Inst. 364. Lay for any Tythes. usque

Bracton l. 5.
c. 4. 402. b.
For a sixth
part.

Articuli Cleri
c. 2.

2 Inst. 491.
Where the In-
dicavit lies.

*usque ad quartam, quintam vel sextam partem
advocationis. Et ultra quam partem non ex-
tenditur prohibitio, prout sibi videtur.*

But whatsoever the Common Law was,
it was now serled by the Statute of *Circum-
specte Agatis*, and *Articuli Cleri*, cap. 2. That
unless at least the Tythes in demand be of
the fourth part of the value of the Church,
this Writ lieth not: The Statute of *Articuli
Cleri*, c. 1. is, *Si sit contentio de jure decimarum
originem habens de jure Patronatus, & earun-
dem decimarum quantitas ascendat ad quartam
partem bonorum Ecclesiæ, locum habeat Regia
prohibitio*, that is to say, a Writ of *Indi-
cavit*.

And this Writ lies, as hath been said,
where one Parson demands Tythes against
another Parson to the fourth part of the
value of the Church or more, which comes
into their Churches by several Patrons; for
if the Incumbents come in both by one Pa-
tron, the Right of the Advowson cannot
come in question, and by consequence this
Writ lies not.

Suppose there be a Parson with a Vica-
rage endowed, whereof the Parson is Pa-
tron; and a Suit be for Tythes belonging
to the Parson, to the value of a fourth part
of the Parsonage, but not to a fourth part
of the Parsonage and Vicarage: It should
seem in this case, though the Vicarage were
derived out of the Parsonage, and may
again be re-united to that, nevertheless by
reason of the several Patrons an *Indicavit*
will lie in this Case.

And

And it is to be observed, that this Writ doth not lie before Libel, nor after definitive Sentence; for the Party that prays this Writ, must shew a Copy of the Libel in the Court of Chancery before he can have it.

And though the Law be restrained at this day to a fourth part of the value of the Church, where before it was at large. Yet the form of the Writ remains, and if the thing in demand be under the fourth part of the value, it must be shewed in Pleading by the other side.

And this Writ lies as well for Offerings as for Tythes; when such Writs is sued and served, and the proceeding in the Spiritual Court stopt, then the Plaintiff there is to sue his Writ of Right of Advowson, of such a portion of Tythes as the Case requires; and this is given by the Statute of *Westm. 2. cap. 5.* in these Words, *Et cum per breve de Indicavit impeditur Rector alicujus Ecclesie ad petendas decimas in vicina parochia. habeat Patronus Rectori sic impedito breve ad petendam advocatorem decimarum petitarum:* But this must be intended where the Patron has the Fee simple of the Advowson. And the *Indicavit* is to be brought in the name of the Patron and his Clerk against the other Incumbent, that sues in the Ecclesiastical Court and his Patron; but the Writ of Right of Advowson is to be sued by the one Patron against the other, and the Patron demandant shall alledge Explees taken by his Incumbent of great and small Tythes.

But

*F.N.B. 45. c. b.
12 E. 4. 13.
When.*

*2 Inst. 364.
The form of
this Writ not
altered by the
Statute.*

*F.N.B. 45 b.
Lies of Offer-
ings.*

Westm. 2. c. 5.

*By whom.
F.N.B. 45. b
But where the
same Parson is
Patron and
Incumbent.
12 E. 4. 13. b.*

F.N.B. 30 b.
The relief of Ten-
nant in Tail,
Purveyances,
&c.

2 Inst. 364.

The Proceeding
remitted.

Regist. 36.a.
33.b.

F.N.B. 30 c.

Scire facias.
18 E. 3. c. 7.

Seld. Hist. de-
cim, 439. &c.
Co. 2 Inst. 640,
&c.

But if the Patron against whom the *Indicavit* is sued, be but Tenant in Tail, Tenant for Life or Years, then he cannot maintain a Writ of Right, but must demand and appear to a Declaration upon an Attachment, and plead his Title, which must be proceeded in, as in other Prohibitions; and when the Title of the Patronage is determined at the Common Law, then the Cause must be remitted to the Ecclesiastical Court, where Sentence must be given according as the Law has determined the Right, and this appears by the Form of the *Indicavit*, which is special, *Vobis precipimus ne placitum illud teneatis, donec discussum fuerit in Curia nostra ad quem illorum pertineat ejusdem Ecclesie advocatio.*

And there is a note in the Register, that this Writ lies of a Vicarage, Prebend, & *aliis similibus* as well as of a Rectory: And the Form of the Writ is thus; *Præcipe A. quod reddat B. advocationem decimarum quarta partis vel medietatis Ecclesie, &c.*

But these Writs, as well as other real Actions, are grown obsolete and seldom put in practice, and therefore thus much shall suffice of the nature and proceeding in them.

The third manner of proceeding for the determining the Right of Tythes at Common Law was by *Scire facias*, which was grounded either upon Letters Patens, Fines or other judicial Records, of which Mr. Selden instances several Precedents; but this manner of Trial being taken away by the Stat. of 18 E. 3. c. 7. I shall say no more of it.

The

The fourth sort of determining the *Writs Mandatory.* Right of Tythes at Common Law, mentioned by Mr. *Selden*, is Writs Mandatory, commanding the payment thereof, whereof he gives some few Instances; but these having never been frequent, and for long time discontinued and grown out of use, I will not trouble the Reader with them, but refer the curious Reader to Mr. *Selden's* *Seld. 444 &c.* History of Tythes, and proceed to the fifth manner of determining the Right of Tythes at the Common Law, which is grounded upon the late Statutes.

For the Statute of 27 H. 8 there hath been sufficient said already; for that of 32 H. 8. that concerns the Temporal Jurisdiction, I shall leave it till the last, and proceed to shew what Authority is given to the Temporal Courts by the Statute of 2 E. 6. cap. 13. being the first Law that ever 2 E. 6. c. 13. gave the Temporal Courts Jurisdiction for the Parson against the Parishioners for subtraction of Tythes, in which there is a Clause to this effect.

And it is enacted by that Statute, after it has confirmed the former Statutes of 27 H. 8. c. 20. and 32 H. 8. c. 7. *That every Treble value. of the King's Subjects should from thenceforth truly and justly without fraud or guile set out, yield and pay all manner of their predial Tythes in their proper kinds, as they arise and happen in such manner and form as hath been of Right yielded and paid within forty years next before, &c. or of Right or Custom ought to have been paid, and that no person thenceforth should take or carry away such or like*

The Parsons Counsellor : Part II.

like Tythes, which had been yielded or paid within the said forty years, or of right ought to have been paid in the place or places titbable of the same, before he hath justly divided or set forth for the Tythes thereof, the tenth part of the same, or otherwise agreed for the same Tythes with the Parson, &c. under the pain of the forfeiture of the treble value of the Tythes so taken and carried away.

2 Inst. 650.

This Clause being compared with the former Clause, almost penned in the same words for the double value, would make a Man at a stand what the meaning of the Parliament was ; and it was forty years (when almost all that were at the making of this Act were dead) before it was found out, that an Action of Debt lay upon this Clause at Common Law for the treble damages ; to wit, *Pasch. 29. Eliz.* in the Exchequer, in an Information by the Queens Attorney against one *Wood* for the treble value, as forfeited to the Queen. In which Case it was resolved, That an Action of Debt lay at the Common Law for the treble damage, for not setting forth of Tythes ; for wheresoever an Act of Parliament gives a Forfeiture against him, that doth dispossess, &c. the Owner of his Property, as here he doth of his Tythes, there the Forfeiture is given to the Party grieved or dispossessed. Since which resolution Actions of Debt have been frequently brought in all the Courts of *Westminster*, by Parsons, Vicars, Proprietors, Owners and Farmers of Tythes, as well Lay as Spiritual upon this Statute, but being so long before it

was

was found out, that an Action lay at Common Law upon this Statute, the Plaintiffs in the recital of the Statute alledged it to be made the fourth of *February, 2 E. 6.* where- as in truth the Parliament begun the First of *E. 6.* and was held by Prorogation the fourth of *February, 2 E. 6.* And this being discovered by an Action between *Oliver and Colier, P. 6 Jac. B.R.* brought upon this Statute, wherein the Statute was misrecited as aforesaid, and exception taken to it in arrest of Judgment, the Court upon good advisement over-ruled the Exception by reason of the multitude of Presidents, and affirmed the Rule, That *multitudo errantium parit errori Patrocinium.* Vide *Hardres* 343.

Washingtons
Rep. 241.

Brownl. 100.
Yelvert. 126.
Dyer 171. p. 6.
Stile 122.

Now considering that this is become a very frequent Action in use, I conceive it will not be improper to the present Occasion, to communicate to the Reader what I have observed and learned in this kind of Actions, not only concerning the Forms of Declarations, Pleadings, Verdicts and Judgments, but likewise what Evidence is necessary upon the general Issues of *non culpa*, and *nil debet*, for the Plaintiff and Defendant: And in the first Case consider in what Cases, and by whom, and against whom this Action may be brought.

* If two be Joynt-Tenants, and they enter and occupy joyntly, the Action must be brought against them joyntly; but if one only enter and occupy, the Action must be brought against him that only occupies alone.

* *Hutt* 121.
122.
By whom and
against whom
Actions lie in
this Statute.

Nota,

Syderf. 88. 181.

Nota, That the Action lies by Executors, but not against Executors.

But if there be two Tenants in Common, and one of them sets out his Tythe, and the other carries it all away, there the Action shall be brought against him, that carries it all away alone.

Noy 3.

If the Parson have two parts of the Tythe, and the Vicar a third part, and one Man farms all, he may sue for all in one Action.

Noy 136.

1 Brown. 86.

Yelvert. 63.

Cro. Jac. 88.

More 912.

If the Husband and Wife in the Right of the Wife be intituled to Tythes, they shall joyn in this Action, because the damage is to survive: But a Parson and a Vicar cannot joyn, but if they joyn in a Lease to a third person, their Farmer may sue for all in one Action; but in the first Case, I see no reason but that the Husband may bring the Action alone, and so I have known it often done.

*The Form of the**Declaration.*Pellet *vers.*

Henworth P.

1657. B.R.

In an Action brought upon this Statute, the Severance was alledged before the sowing, and Exception taken after Verdict; but the Exception was disallowed, because the shewing of the sowing was superfluous, and so aided by the Verdict.

Cro. Car. 324.

The taking was alledged after the Plaintiffs Term was ended, and yet held good.

More 911.

M. 40 and 41 Eliz. A Judgment was arrested, because the Suit was brought *respondendum iam Domino Regi quam parti* but this Case I very much doubt, for being against a Statute Law it is a Contempt finale, though the Plaintiff have the Forfeiture

ture, as upon the Statute of Heu and Cry, &c. and I take the Case *inter Lurvered* and *Hetley* 121. *Owen, M. 4. Jac. C. B.* for the better Law, where it was held good.

In an Action of Debt, upon the Statute *Hardres* 173. of 2. E. 6. a Parson sued for Tythe in a foreign Parish, without shewing how he was intituled to them, which was moved in Arrest of Judgment after Verdict, notwithstanding it was held good. Another Exception was, That he had not alledged that the Defendant was *Subdit. Domini Regis*, *Vid. Cro. Jac.* but likewise over-ruled, because he was al- 324. ledged to be an Occupier of Lands.

Upon an Action brought by two upon *Cro. El.* 170. this Statute, who made their Title by a Lease from a Patente^e of the King, and Exception was taken, because they did not shew the Patent, but disallowed. 1. Because the Letters Patents did not belong to the Plaintiffs. 2. Because the Plaintiffs did not demand the Tythes themselves, but damages for a Tort; another Exception was taken to the Declaration, because the Plaintiff alledged the Defendant did not agree with them, and did not say, or either of them, but held good by Intendment.

And it hath been adjudged, That in this Action, the Plaintiff needs not to shew his Title especially, but it is enough for him to allege that he is Proprietor, Farmer or Rector, generally without shewing how. 2 *Bull.* 65, 228, 183. 1 *Brown.* 86. *Noy* 3. *Yelvert.* 63. *Cro. Jac.* 62. 361.

And it hath been held good, though the Plaintiff in his Declaration do not express the Quantities or Loads of the Corn or Hay carried away. 2 *Brown.* 70, 71.

And

2 Inst. 650.

And so it is, though you do not express in your Declaration the kinds of the Grain carried away.

Coke *vers.*

Smith, H. 7.

Car. 1. 10. 587.

B. R. per Latch.

Where a Man alledged, that he was Farmer of all the Tythe-Corn arising, &c. upon sixty Acres of Land in D. and did not alledge which they wert in certain, and yet allowed for good. 2. The Plaintiff alledged the Defendants Occupiers, but did not say, whether joynly or in common, and yet held good. 3. The Plaintiff had alledged no time of the carrying away, but having alledged no time of the severance, and the carrying away, coming in with a Conjunction copulative, it was held well enough.

Cro. Jac. 324.

2 Bulstr. 144.

In an Action brought upon this Statute, the Plaintiff averred in his Declaration, That he was *Subditus dicti Domini Regis*, having recited the Statute, and it was held naught, because it must necessarily be intended E. 6. and not of the present King.

*Pleas in this
Action.*

Porter *vers.*

Rochester.

Hill 9 Jac. B. R.

In an Action upon this Statute the Defendant pleaded a Recovery in the Ecclesiastical Court; but it was held no good Plea at Common Law; but I conceive it would be a good Evidence upon *nil debet* pleaded, otherwise the Parishioner were in an ill Condition.

Wortley *vers.*

Empringham.

P. 42 El. B. R.

Hob 218.

Cro. El. 766.

Cro. Jac. 361.

More 914.

In this Action *non culp* and *non debet* have been both held good Issues, but it is no good Plea to plead, that the Plaintiff sowed the Corn, and sold it to the Defendant, because this matter will not excuse the payment of Tythes.

Now

Now having brought the Cause to issue upon *nil debet* or *non culp.* we will shew in the next place, what will be good and material Evidence, as well for the Plaintiff as Defendant.

First, If the Plaintiff be a Parson, Vicar, or other Ecclesiastick, and have not been some considerable time in possession of his Living, in which I have not observed any constant Rule amongst the Judges in their practice, but ten years quiet possession for the most part is allowed by the Judges for an Evidence of the Plaintiffs Title, unless some material Objection be made against it to draw it into question; but if the Plaintiff have been put for some short time in possession, or the possession litigious, then the Judges usually put the Plaintiff to prove his Institution and Induction; and now he must prove, that he was in Episcopal Orders at the time of his Institution, otherwise his Institution is void. By the late Act of Uniformity he must produce a Certificate under the Hand and Seal of the Bishop, &c. that instituted him, that he subscribed the Declaration mentioned in the Act of Uniformity, and must prove he subscribed the same in the presence of the Bishop, or, &c. and he must prove, that within two Months after he was Inducted, upon some Sunday or Lord's Day during Divine Service, he read the thirty nine Articles of Religion in the Parish-Church into which

What Evidence is necessary in this Action, ex parte quer.

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he

he was Inducted, and that he did declare his unfeigned assent and consent to all things therein contained; and he must likewise prove, that within two Months after actual possession of his Living, he read Morning and Evening Prayer in his Church upon some Lord's day, and openly and publickly before the Congregation declared his assent and consent to the use of all things therein, contained and prescribed in these words; *I A. B. do here declare my unfeigned assent and consent to all and every thing contained and prescribed in and by the Book, Intituled, The Book of Common Prayer and Administration of the Sacraments, and other Rites and Ceremonies of the Church, according to the use of the Church of England; together with the Psalter or Psalms of David, pointed as they are to be sung or said in Churches; and the form and manner of Making, or Ordaining and Consecrating Bishops, Priests and Deacons.*

The Parson, Vicar, &c. having thus made himself a Title, must proceed to prove the taking and carrying away the Corn, Hay, &c. and the value; and, if need be, that the Land lies within the Parish, &c. but this the Judges put them to prove first of all commonly.

But if the Plaintiff be a Farmer or Tenant under the Crown he must prove his Title; but if he have been any considerable time in possession, and the Title not controverted, the Judges seldom put the Plaintiff to shew any more Title but his

his bare possession and enjoyment, and that others pay him Tythes.

And so having shewed what is necessary the Plaintiff should be prepared to prove, I will proceed to shew what defence the Defendant may make.

The Defendant upon the general issue of Not guilty, &c. may prove that he duly set forth his Tythes; but if he afterwards carried them away, it will not serve his turn; so if he sell his Corn privately to another, and after he has sold it privately, cuts and carries it away, the Action lies against the first Owner; the same Law is, where the Owner of the Land privately sell his Corn to another who privately cuts and carries it away.

Ex parte defendantis.
Brown. 1. 34.

Inst. 649.

If there be two Farmers sue, and the Defendant pleads *nil debet*, and upon the tryal prove an agreement with one of them, this shall bind his Companion.

More 919.

And the Defendant may prove that another has a better Title to whom he has paid his Tythes, or compounded with him for them.

Or that he may prove, that the Parson came in by Simony, or any other matter that makes his Presentation, Institution or Induction void, or any other defect in not reading the Articles, &c.

Or he may prove, that he set forth his Tythes, and a Stranger carried them away; or may give in evidence, a Lease or Grant from the Plaintiff himself, or to any other to whom he can make a good Title,

ele, but such Leases and Grants must be in Writing, unless for one Year only, to the Owner of the Land, which hath been held good by way of retainer.

Verdict.

The Jury, if they find for the Plaintiff, are to find how much of the Debt demanded by the Declaration is due to the Plaintiff, which they are to do by trebling the value of the Tythe subtracted, wherein they are usually assisted by the Court.

Judgment.

The Judgment is always given for the Debt found by the Jury without Costs, because this Action is grounded upon a penal Law, where no Action lay at Common-Law, neither shall the Defendant have any Costs if the Verdict pass for him : But if the Jury should upon the Tryal give Cost and Damage, the Plaintiff may release them and take his Judgment : But if Judgment be given for the Plaintiff in an Action brought upon this Statute by *Nihil dicit, non sum informatus*, or Demurrer, the Plaintiff shall have Judgment for the whole Debt demanded by his Declaration. And if an Action upon this Statute be brought against two or more, and Verdict only pass against one, or part of the Defendants, the Plaintiff shall have Judgment against those against whom the Verdict passes, though the others be acquitted.

More 915.

Cro. Jac. 361,
562.

Stiles 317,
318.

Note.

Note, That this Statute, as to the treble value and double value, extends only to Predial Tythes and not to Personal, mixt, or other Church-Duties.

The Chancery likewise by English Bill Savil 69.^o. holds Plea of Tythes, as may be made out by many Precedents.

The Exchequer likewise by English Bill *Jurisdiction of the Exchequer.* holds Plea for a single value, for subtraction of all manner of Tythes, Oblations, &c. of which great use hath been made since the late Wars; and there they decree the single value with costs, and the future payment, which is of great advantage to the Plaintiffs, and these Suits are not interrupted with Prohibitions; but these Suits are often very costly too: For if a *Modus decimandi*, or the bounds of the Parish come in question, and the proof not very clear, they are frequently sent to Tryals at Law, which gives delay and increases the charges very much. This Jurisdiction, I take it, is much fortified since Tenths and First fruits were annexed to the Crown: But Suits of this nature were rarely brought in this Court before the War: However, there are some ancient Books prove, that this Court on the Law side has assumed the Jurisdiction of Tythes, but the Reporter reports it with a *quod mirum*. 38 Aff. p 20. 44 E.3.43,44.

Where the King's Copy-holder pleaded Lane 39.^o. a *Modus*, it must be tryed in the Exchequer, and for this cause a Prohibition was granted.

It is evident in our Books of Law, that the right of Tythes were frequently determined at Common Law in Actions of Trespass for taking away of Tythes, unless both Parties were Clergy-men; and some- 50 E.3.20. 2 H.4.15. 20 H.6.17. 1 H.6.5. 2 E.4.5. 44 Aff. p.25.

38 E. 3. 5.

22 E. 4. 24.

25 H. 8. Br. Ju-
risdiction 95.

times Affises have been brought at Common Law for Tythes between Lay-persons. And it is held in the 25 H. 8. that where the Lord of a Mannor claimed Tythes in consideration of finding a Chaplain at such a Chappel, and the Parishioners claimed them likewise upon the same consideration, that the right of these Tythes being between Lay-persons was tryable at Common Law only.

38 E. 3. 5.

And at this day, if Tythes be once set forth and divided from the nine parts by the Owner of the Corn, and any person that has not right to them carries them away; the Suit for this Trespass must be in the Temporal, and not in the Spiritual.

Stat. 32 H. 8.
cap. 7.

And by the Statute of 32 H. 8. it is Enacted, That in all cases where any person, &c. which then had, or then after should have any Estate of Inheritance, Free-hold &c. in or to any Parsonage, Vicarage, Portion, Pension, Tythes, Oblations, and which then were, or then after should be made Temporal, or admitted to be, abide and go to, or in Temporal Hands and Lay Uses, and Profits by the Law, &c. should then after fortune to be disseised, deforced, wronged, or otherwise kept or put out from their lawful Inheritance, Estate, Seisin, Possession, Occupation, Term, Right or Interest, of, in, or to the same, or, &c. by any other person, or, &c. claiming or pretending to have Interest or Title to the same, that then, and in every such case, &c. the Person, &c. to

dis-

disseised, &c. the Heirs, Wives, &c. shall and may have their Remedy in the King's Temporal Courts, and other Temporal Courts, as the Case shall require for the recovering, &c. such Inheritance, &c. by Writs Original of, *Quod ei deforceat, præcipe quod reddat, Assize, &c.* as the Case shall require, &c. So that since this Statute the Case is put out of all doubt, that for such Tythes, &c. which are become Lay-fee, the Right, Title and Possession is become determinable at the Common Law; and all manner of real Actions, Ejectments, and other personal Actions, are brought there as the Case requires daily.

There was a Bill exhibited by a Vicar Hardres 130. in the Exchequer, and the Vicar who was Plaintiff did not shew how the Tythes he sued for became due, whether by Prescription or Indowment, and Exception taken to it at the Hearing; but because the Defendant had admitted the Plaintiff Vicar, and that the Tythes were due and insisted upon the payment, the Exception was over-ruled, but the Book allows it to have been a good Cause of Demurrer.

And yet *H. 15 Car. 2. inter Stone and Lud-* Hardres 321.
low such a Bill upon Demurrer was held 322.
good. *Ideo quære.*

An English Bill was exhibited in the Hardres 132.
Exchequer for the Tythe of Houses in 133.
London, to have a discovery of the improved Rents, and the Defendant alleged a *Modus*, and Exception taken to

the Answer because the Defendant did not discover the Rents, but the Court held that the *Modus* being alledged by way of Answer, the Defendant ought to Answer all the Bill, and discover the Rents; but if he had alledged it by way of Plea, he had not been bound to answer any other part of the Bill; and if the Plea were over-ruled, then the Defendant should answer Interrogatories to the Particulars.

Hardres 190.

In a Bill in the Exchequer for Tythes, the Plaintiff did not alledge, that he was content with the single value according to the Common Form, and for that Cause was demurred to and over-ruled, because this Court had Jurisdiction before the Stat. of 2 E. 1. was made.

Hardres 322.

In a Bill in the Exchequer for Tythes, the Defendant pleaded that the Lands out of which the Tythes arose belonged to such a Monastery, which was discharged from payment of Tythes by their Order, but did not shew of what Order the Monastery was, and yet held good. *Vide Stat. 7 & 8 W. 3. c. 6. 10 & 11 W. 3. c. 15. and 7 & 8 W. 3. c. 34.*

And now having shewed in how many Courts, and how many ways Tythes may be recovered, it calls to my mind the Fable of the Fox and the Cat, who had but one way to shift for her self when the Huntsmen came, but that one proved better and more secure than all the shifts the Fox had boasted of; for, upon the whole matter, it were much better for the Reverend Clergy, if they had one ready way to recover single damages with their Costs

of

of Suits at Common Law, where they might not be interrupted by Prohibitions, and clashing of Jurisdctions, and tost from one Court to another, than all these ways I have mentioned. And it is a wonder to me, that there being hardly a Lord in Parliament, nor many of the House of Commons, that have not some part of their Estates in Impropriations, though they had no kindness to the Church, yet for their own interest and concerns, have not to that purpose preferred some Law in Parliament before this time; which might be done in a few Lines, by giving an Action of the Case at Common Law for the subtraction of Tythes with Costs, or if the Parliament should think fit the smaller sort of Tythes might be determined in a Summary way by the Justices of Peace with an Appeal to the Judges of Assize; but this I humbly submit, as I do all the rest, to better Judgments.

I have now finished this small Tract, *The Conclusion of the whole.* whereby I wish the Reverend Clergy may receive as much satisfaction as I desire, or they can expect. And I shall now conclude all with a List of those Monasteries, the Lands of which are only capable to be discharged of the payment of Tythes, by Order, Bull, Prescription, real Composition, or otherwise, that every Clergy-man may satisfy himself without farther enquiry, whether such Monastery Lands as shall happen to be in his Parish, &c. may have

The Parsons Counsellor : Part II.

have the benefit of the Statute of 31 H. 8. to be free'd from the payment of Tythes : And in the List following I have set down the times of the Foundations of the several Monasteries, that being material to know ; for if they were Founded since the first Year of R. 1. they cannot prescribe in *non decimando*. I have also for the most part set down what Order the Houses were of, that the Reader may satisfy himself whether they were of any of those Orders that were privileged from the payment of Tythes : For the Valuations I have followed Mr. *Dugdale*, as being a sure Author, having observed many Errors in that of Mr. *Speed*.

In the perusal of this Catalogue you will find how many Foundations were made of Monasteries in the first Century after the Conquest, and till the Reign of King *John*; that if they had continued at that rate, the greatest part, if not all the Land in *England*, had by this day been Monastery Land. But in King *John*'s time they began to slack ; and in the Ninth of H. 3. the Statute of Mortmain was made, after which you will find but few Religious Houses (as they were called) Founded.

Magna Charta,

Dugdale 145.

*Stow's Survey
of London,
930.*

The *Cistercian* Order came into *England* about the year of our Lord 1128. and in the ensuing Table you may see how well they prospered, that in so short a time there should be so many of the greater Abbies of that Order ; but it should seem this Order began sooner. See *Monasticon Angl.* li. 1. p. 695. m. 1098.

The

The Black Canons regular of St. *Augustine* first came into *England*, as Mr. *Stow* says, in the year 1108. and were first placed in Trinity Church within *Aldgate*, *London*. But I rather think he is mistaken in the time, for I find some Monasteries of that Order before that time : However, the ensuing Catalogue will inform you of their increafe.

And it is without dispute that the increafe of Monasteries, especially those of privileged Orders, tended very much to the prejudice of the Secular Clergy that had the Cure of Souls; for besides the Orders they were privileged, they appropriated all the Churches they could obtain; and how ill they were served, a Man man in some measure observe that peruses the Statute of 15 R.2. and 4 H.4. for it appears by them that they endowed no Vicarages at all upon the appropriating Churches, or so meanly that the Vicars could not live upon them, and not at all Hospitality practised. And therefore the Parliament of *England*, which has always put a stop to the Usurpations and Exorbitances of *Rome*, and to prevent the Religious Houses destroying the Church, in the 15th year of the Reign of King *Richard* the Second, made a Law, That the Diocesan of the place where any Church was to be appropriated, should take care the Vicarage should be well and sufficiently endowed, besides a portion to the Poor. But this Act not having the effect was desired and expected, the Bishops of those times

Endowment of Vicarages.

15 R.2. c.26.

Palmer's Rep.
219.

times being over-awed by his Holinesses Mandates, or participating too much of his Qualities, a second good Act was made 14 H. 4 cap. 12. in the 14th Year of King Henry the Fourth, whereby it is Enacted, *That all those Appropriations that were made since the former Statute without such Endowments, were declared to be void. And that no Religious Person (that is, Monks and Fryars) should be made Vicar in any Church appropriated or to be appropriated by any means in time to come, and that no Vicarage should be appropriated by these Statutes, and divers other Statutes cited in this Work upon several Occasions.* It is easy to guess what Opinion they had, even in the times of Popery, of these People called Religious Men.

I have now made too long a Digression; and will therefore proceed to the Catalogue I promised the Reader.

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A Catalogue of the several Monasteries, that, upon the general Survey taken in the 26th Year of *H. 8.* were returned to be of the Annuai Value of 200 *l. per Ann.* and upwards within *England* and *Wales*, and by consequence dissolved by the Statute of 31 *H. 8.* and by that means are capable of being discharged of the payment of Tythes; with the Date of their Foundations, as near as I can compute, with what Orders they were of. In which observe, That *A.* stands for *Abbey*, *P.* for *Priory*, *Ben.* for *Benedictins*, *Cist.* for *Cistertians*, *Præm.* for *Præmonstratenses*, *Car.* for *Carthusians*, *C. S. A.* for *Canons of St. Austin*, *F.* for *Founded*, *T.* for *Tempore*; and in the Valuations I have rejected all *ob.* and *q.*

Berks.

	<i>l.</i>	<i>s.</i>	<i>d.</i>
R Eading <i>Ben. F. T. H. i.</i>	1938	14	3
Bushelham <i>A. C. S. A. F. 13 E. 3.</i>	285	11	0
Abington <i>A. Ben. F. 720.</i>	1876	10	9

Bedford.

Newnham <i>P. C. S. A. T. H. i.</i>	293	5	11
Elmestow <i>A. Ben. F. T. W. Conquest</i>	284	12	11
Wardon <i>A. Cist. F. 4. Steph. 1138.</i>	389	16	6
Chicksand <i>P. White C. Gibertines F. T. W. Ruf.</i>	212	3	5
Dunstable <i>A. C. S. A. F. T. H. i.</i>	344	13	3
Woburn <i>A. Cist. F. T. Johannis Regis.</i>	391	18	2

Bucks.

The Catalogue of Monasteries.

Bucks.

	<i>l.</i>	<i>s.</i>	<i>d.</i>
Ashrugge <i>Coll.C.S.A.F.T. E.I.</i>	416	16	4
Noteley <i>A.C.S.A.F.T. H.I. 1112,</i>	437	6	8
Missenden <i>A.Ben.F. 1293.</i>	261	14	6

Cantabr.

Thorney <i>A.Ben.F. 972.</i>	411	12	11
Barnwel <i>P.C.S.A.F.T. H.I. 1092.</i>	256	11	10

Cestr.

S. Werburge <i>A.Ben.F. 1095.</i>	1003	5	11
Combermeve <i>A.Cist.F. 1134.</i>	225	9	7

Cornub.

Bodnim <i>P.C.S.A.F. 936.</i>	270	0	11
Launceston <i>A.C.S.A.T. W. Conquest.</i>	354	0	11
St. Germans <i>A.C.S.A.F.T. Ethelstani Regis.</i>	243	8	0

Cumbr.

Carlisle <i>P.C.S.A.F.T. W. Ruf.</i>	418	3	4
Holmcoltrum <i>A.Cist.F. 1135.</i>	427	19	3

Derb.

Darley <i>A.C.S.A.F.T. H.2.</i>	258	14	5
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Devon.

Ford <i>A.Cist.F. 1133.</i>	374	10	6
Newham <i>A.Cist.F. circa 1246.</i>	227	7	8
Dinkefwell			

The Catalogue of Monasteries.

	<i>l.</i>	<i>s.</i>	<i>d.</i>
Dinkswel <i>A.Cist.F.</i> 1201.	294	18	6
Hertland <i>A.C.S.A.F.T.</i> H. 2.	306	3	2
Torre <i>A.Prem.F.T.</i> R. 1.	396	0	2
Buckfast <i>A.Cist.F.T.</i> H. 2.	466	11	11
Plimpton <i>A.Cist.F.T.</i> E. 1.	241	17	9
Tavestock <i>A.Ben.F.</i> 961.	902	5	7
Exon <i>P.Cluna F.T.</i> H. 1.	502	12	9

Dorset.

Abbotsbury <i>Ben.F.</i> circa 1016.	390	19	2
Middleton <i>A.Ben.F.</i> per R. Ethelstan.	578	13	11
Tarrent <i>A.Cist.F.</i> per H. 3.	214	7	9
Shafton <i>A.Ben.F.</i> 941.	1166	8	9
Cerne <i>A.Ben.F.T.</i> R. Edgari	515	17	10
Sherborne <i>A.Ben.F.</i> circa 370.	682	14	7

Dunelm.

St. Cuthbert <i>A.Ben.F.</i> circa 824.	1366	10	9
Tinmouth <i>P.Ben.F.</i>	397	10	5

Essex.

Berking <i>A.Ben.F.</i> 680.	862	12	5
Stratford Langthorn <i>A.Cist.F.</i> 1135.	511	16	3
Waltham <i>A.C.S.A.F.</i> circa 1060.	600	4	3
Walden <i>A.Ben.F.</i> 1136.	772	18	1
St. Oswith <i>A.C.S.A.F.</i> 1120.	677	1	2
Colchester <i>A.C.S.A.T.</i> H. 1.	523	17	0

Glouc.

Bristol <i>A.C.S.A.F.</i> circa T. H. 1.	670	13	11
Hales <i>A.Cist.F.</i> 1246.	357	7	8
	Winch-		

The Catalogue of Monasteries.

	<i>l.</i>	<i>s.</i>	<i>d.</i>
Winchcomb <i>A.Ben.F.</i> 787.	759	11	9
Tewsbury <i>A.Ben.F.</i> 715.	1598	1	2
Cirencester <i>A.C.S.A.F.T.</i> H.1	1051	7	1
Kingswood <i>A.Cist.F.</i> 1139.	244	11	3
Gloucester <i>A.Ben.F.</i> 680.	1946	5	9
Lanthony <i>P. juxta Glouc. C.S.A.F.</i> 1136.	648	19	11

Hants.

St. Swithins Winton. <i>A.Ben.F.</i> 634.	1507	17	2
Hyde <i>A.Ben.F.</i> per Regem Elfred.	865	18	0
Wherwel <i>A.Ben.F.T.</i> Edgari Reg.	339	8	7
Romsey moniales <i>Ben.F.</i> 907.	393	10	10
Twinham <i>P.C.S.A.F.</i> ante 1042.	312	7	0
Bello loco <i>A.Cist.F.</i> 1204.	326	13	2
Southwick <i>P.C.S.A.F.T.</i> H.1.	257	4	4
Tichfield <i>A.Prem.F.T.</i> H.3.	249	16	1

Hertford.

St. Albans <i>A.Ben.F.</i> 755.	2102	7	1
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Hunts.

St. Neots <i>A.Ben.F.</i> circa T. H.1.	241	11	4
Ramsey <i>A.Ben.F.</i> 969.	1716	12	4

Kane.

St. Austins prope Cant. <i>A.Ben.F.</i> 605.	1413	4	11
Ledis <i>P.C.S.A.F.</i> 1119.	362	7	7
Feversham <i>A.Clun.F.</i> 1147. per R. Steph.	286	12	6
Boxley <i>A.Cist.F.</i> 1144.	204	4	11
Roffen <i>A.Ben.F.</i> 600.	486	11	9
Malling <i>A.Ben.</i> per Regem Edm.	218	4	2

Dertford

The Catalogue of Monasteries.

		<i>l.</i>	<i>s.</i>	<i>d.</i>
Dertford	<i>A.C.S.A.F.</i> 49 E. 3. per ipf. R.	380	0	0

Lanc.

Whalley	<i>A.Cist.F.</i> 1172.	321	9	1
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Leic.

Leicest.	<i>A.C.S.A.F.</i> 1143.	951	14	5
Croxden	<i>A.Prem.</i> circa T. R. 1. Reg.	385	0	10
Launda	<i>A.C.S.A.F.T.</i> W. Ruf.	399	3	3

Lincoln.

Lincoln St. Cath.	<i>P.Gilbert.F.T.</i> H. 2.	202	5	0
Kirkstee	<i>A.Cist.F.</i> 1139.	286	2	7
Revsly	<i>A.Cist.F.</i> 1142.	287	2	4
Thornton	<i>A.C.S.A.F.</i> 1139.	594	17	10
Bardney	<i>A.Ben.F.</i> 712.	366	6	1
Croyland	<i>A.Ben.T.</i> Reg. Ethelred. 716.	1803	15	10
Spalding	<i>A.Ben.F.</i> 1052.	761	8	11
Sempringham	<i>A.Gilb.F.</i> 1148. 14 Steph.	317	4	1
Epworth moniale	<i>Cartbus.</i> 10 R. 2. fundat.	237	15	2

London and Midd.

St. John Jerusl.	<i>P.F.T. H.</i> 1. 1100.	2385	12	8
St. Barthol. Smithfield	<i>C.S.A.F.</i> 1102.	653	15	0
St. Mary Bishopsgate	<i>Pr.F.</i> 1187. 9 R. 1.	478	6	6
Clerkenwel	<i>P.Ben.F.T.</i> Reg. Steph.	262	19	0
London Minors	<i>Ben.F.T.</i> E. 1.	318	8	5
Westminster	<i>A.Ben.F.T.</i> Edgari.	3471	0	2
Sion	<i>A.C.S.A.F.</i> per Reg. H. 5.	1731	8	4
London domus Cart.	<i>fundat.T.</i> E. 3. Reg.	642	0	4
S. Clare extra Algate	<i>monial.F.</i> 1292.	418	8	5

E e

St. Mary

The Catalogue of Monasteries.

	<i>l.</i>	<i>s.</i>	<i>d.</i>
St. Mary Charter-house Carth. <i>F.</i> 1371.	736	2	7
St. Johns Holywell monial. <i>nigr. f.</i> 1318.	347	1	3
St. Mary East-Smithfield <i>A.Cist.F.</i> 34 E.3.	602	11	10

Norfol.

Thetford <i>A.Clun.F.</i> 1103.	312	14	4
Wymundham <i>A.Ben.F.</i> 1139.	211	16	6
Hulmo <i>A.Ben.F.</i> per Canutum Reg.	583	17	0
Westdreham <i>A.Præm.F.T.</i> H.2.	228	0	0
Walsingham <i>A.C.S.A.F.</i> circa T. Steph.R.	391	11	7
Castle Acre <i>A.Clun.F.</i> 1090.	306	11	4
West Acre <i>A.Clun.F.T.</i> W.Ruf.	260	13	7

Northton.

Burgi St. Pet. <i>A.Ben.F.</i> per ro. fere R.Mer.	1721	14	0
Pipewell <i>A.Cist.F.</i> 1143.	286	11	8
S. Andreas <i>P.Clun.F.</i> 1067.	263	7	1
Sulby <i>A.Præm.F.T.</i> Steph.Reg.	258	8	5

Nott.

Lenton <i>P.Clun. fund.T.</i> H.1.	329	5	10
Thugarton <i>P.C.S.A.F.T.</i> H.1.	259	9	4
Welbeck <i>A.C.S.A.F.T.</i> Reg.Steph.	249	6	3
Warfop <i>P.C.S.A. fundat.</i>	239	10	5
Bella Valla <i>Pri.Carth.F.</i> circa 16 E.3.	227	8	8
Newstead <i>P.C.S.A.F.T.</i> E.3.	219	18	8

*These two last are under value in Mr. Dugdale,
but thus per Speed.*

Northambr.

Tinmouth a Cell to St. Albans a Nunnery.	511	4	1
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Oxon.

The Catalogue of Monasteries.

Oxon.

	<i>l.</i>	<i>s.</i>	<i>d.</i>
Godstow <i>A. Ben. F.T. Steph. Reg.</i>	274	5	10
Eynesham <i>A. Ben. F.T. Ethelred. Reg.</i>	441	12	2
Osney <i>A.C.S.A.F.T. H.1.</i>	654	10	2
Thama <i>A. Cist. F.T. H.1. per Speed.</i>	256	13	7
Oxford P. per Speed. <i>fund. ante Conq.</i>	224	4	8
Dorchester per eundem <i>A.C.S.A.F. 635.</i>	219	12	0

Salop:

Hagmond <i>A.C.S.A.F. 1180.</i>	259	13	7
Lillestul <i>A.C.S.A.F. per Adelfleda R. Mercia.</i>	229	3	1
Wigmore <i>A.C.S.A.F. 1172. per Speed.</i>	267	2	10
Wenlock <i>P. Clun. F. 1181. vel antea.</i>	401	0	7
Salop <i>A.C.S.A.F. 1081. per Speed.</i>	615	4	3
Hales Owen <i>A. Pram. fund. T. R. Joh.</i>	337	15	6

Somerset.

Glassenbury <i>A. Ben. circa 300 F.</i>	3311	7	4
Bruton <i>A.C.S.A.F.T. Conquest.</i>	439	6	8
Henton <i>P. Carth. F.T. H.3.</i>	248	19	2
Witham <i>P. Cart. F. per H.2.</i>	215	15	0
Taunton <i>P.C.S.A.T. H.1.</i>	286	8	10
Bathon <i>A. Ben. F.T. H.3.</i>	617	2	3
Keynesham <i>A.C.S.A.F.T. H.1.</i>	419	14	3
Michelney <i>A. Ben. F. 740.</i>	447	4	11
Buckland <i>P. Cist. F.T. E.1.</i>	223	7	4

Staff.

De la cres <i>A. Cist. F. 1153.</i>	227	5	0
Burton. sup. Trent. <i>A. Ben. F.T. Eadredi R.</i>	267	14	3
Croxden <i>A. Cist. cont. Fundat.</i>			

E e 2

Suffolk.

The Catalogue of Monasteries.

Suffolk.

	<i>l.</i>	<i>s.</i>	<i>d.</i>
S. Edmundi Bury <i>A. Ben. F.</i> 1020.	1659	13	11
Butley <i>A. C. S. A. F.</i> 1171.	318	17	2
Sibeton <i>A. Cist. F.</i> 1150.	250	15	7
Ixworth <i>P. C. S. A. F. T.</i> Conq.	280	9	5

Surrey.

Merton <i>P. C. S. A. F. T. H. 1.</i> 1121.	957	19	5
Shene <i>P. Carth. F.</i> 1414.	777	12	0
Chertsey <i>A. Ben. F.</i> 666.	659	15	8
Newark <i>P.</i>	258	11	11
St. Maries Overf. <i>A. C. S. A. F.</i> 7 H. 1.	624	6	6
Permundesey <i>A. C. S. A. F.</i> 7 H. 1.	474	14	4

Suffex.

Lewes <i>A. Clun. F. T. W. R.</i>	920	4	6
Roberts-bridge <i>A. Cist. F. T. H. 2.</i>	248	10	6
Battayle <i>A. Black Monks F.</i> 1066.	987	0	11

Warw.

Combe <i>A. Cist. F. T.</i> Seph. R.	311	15	1
Kenelworth <i>A. C. S. A. F. T. H. 1.</i>	538	19	0
Merival <i>A. Cist. F.</i> 1148.	254	1	8
Nuneaton monial <i>Ben. F. T. H. 2.</i>	253	14	5

Wilt.

Malmesbury <i>A. Ben. F.</i> circa 670.	803	17	7
Bradénstock <i>P. C. S. A. F. T.</i> Conq.	212	19	3
Edington <i>P. C. S. A. F.</i> 1352.	442	9	7
Ambresbury <i>A. Ben. F.</i> 1177.	495	15	2

Wilton

The Catalogue of Monasteries.

	<i>l.</i>	<i>s.</i>	<i>d.</i>
Wilton <i>A.Ben.F.T.</i> Ethelwolpi R.	601	1	1
Fareley <i>a Cell</i> to Lewes per Speed <i>F.</i> } 1125. <i>Clun.</i>	217	0	4
Lacock <i>A.C.S.A.F.</i> 1232. per Speed,	203	12	3

Wigorn.

Malverne <i>A.Ben.F.</i> 1083.	308	1	5
Evesham <i>A.Ben.T.</i> Offæ.	1183	12	9
Perthore <i>A.Cist.F.</i> 1138.	643	4	5
Halesowen <i>A.Prem.F.T.</i> John Reg.	282	13	4
Brodesly <i>A.Cist.F.</i> 1138.	388	9	10

Eborum.

St. Mary Eborum <i>A.Ben.F.</i> 2 W. Ruf.	1550	7	0
Selby <i>A.Ben.F.T.</i> Conq.	729	12	10
Kirkstall <i>A.Cist.F.</i> 1147.	329	2	11
De rupe <i>A.Cist.F.</i> 1147.	224	2	5
Monks Burton <i>A.Clun.F.</i> circa 1186.	2039	3	6
Nostel <i>A.C.S.A.F.T.</i> H.1.	492	18	2
Pomfrait <i>A.Clun.F.T.</i> Conq.	337	14	8
Gisborne <i>A.C.S.A.F.T.</i> Steph. Reg.	628	3	4
Whitby <i>A.Ben.F.T.</i> Conq.	437	2	9
Montegratiæ <i>A.Carth.F.</i> circa 1396.	323	2	10
Newburge <i>P.C.S.A.F.</i> 1145.	3067	8	3
Belland <i>A.Cist.F.</i> 1134.	238	9	4
Kirkham <i>A.C.S.A.F.T.</i> H.1.	269	5	9
Melfa <i>A.Cist.F.</i> 1136.	299	6	4
Brilington <i>C.S.A.F.T.</i> H.1.	547	6	11
Walton <i>A.Gilbertines F.T.</i> Steph. Reg.	360	16	10
Bolton in Craven <i>P.C.S.A.F.T.</i> H.1.	212	3	4
Rival <i>A.Cist.F.</i> 1132.	278	10	2
Jerval <i>A.Cist.F.T.</i> Steph. Reg.	234	18	5
Furnes <i>A.Cist.F.</i> 1127.	805	16	5

The Catalogue of Monasteries.

	<i>l.</i>	<i>s.</i>	<i>d.</i>
De Fontibus <i>Cist. F.</i> 1132.	998	6	8
Warter <i>P.C.S. A.F.T. H. I.</i>	221	3	10
Rithal per Speed.	351	14	6
Old Maulton <i>A.F.T. Steph. R.</i> per Speed.	257	7	0
S. Michael juxta Hull <i>Cartb. F.</i> 1377.	231	17	3

Wallia.

Valla de Sancta Cruce Com. Denbigh,	}	214	3	5
<i>Cist. F.T. E. I.</i>				
Strada Florida Cardigansh. <i>Cist. or Clun.</i>	}	1226	6	0
<i>F.T. Conq.</i>				

Gloria Deo Patri, Deo Filio, & Deo
Spiritui Sancto. Amen.

T H E
T A B L E.

A.

- A** cceptance of Rent, where it shall affirm a Lease, 132. Acceptance of Rent by a Parson, Vicar or Prebend, will not affirm the Lease of his Predecessor, 133. Where a Parson shall be bound by the acceptance of Fealty, 134. By a Bishop upon Lease for Lives of Tythes, *ibid.* A Lease for years of Tythes how it shall operate, *ibid.*
- Admission, In what manner to be made, 7. Not to be done hastily, *ibid.* & 59. The danger thereof, 59
- Aftermaths, Where Tythes are due for them, 136
- Agistment, vide Herbage.
- Alteragium, quid, 216
- Annates, vide First-fruits.
- Archdeacons, Their original and growth, 284, &c. Oculi Episcopi & quare, 288. Vide plus de eis in Procurations.
- Arms and Ensigns of Honour in Churches, vide ^{old} Churches.
- Arrests in Churches or Church-yards, vide Churches.
- Assessments for the Repair of Churches, vide in Church.

The Table.

*Augmentations of Stipends, &c. of poor Vicars and Curates
settled,*

228

B.

Barren Lands, Which shall be free from the payment of
Tytbe Corn and Hay, 319
Bees, What Tythes are due for them, 259
Bishop, What time he hath to examine a Clerk, 7. Admits
a Clerk before the Church becomes litigious, 13. He
is not bound by a Verdict in a Jure Patronatus, 16.
An Action of the Case lies against him if he admit
the contrary Clerk, *ibid.* Coparceners present severally
which Clerk he must admit, 18. If Joynt-Tenants, or
Tenants in Common present severally, what's to be
done, *ibid.* Though the Church be litigious he may admit
either Clerk at his peril, 14. What Office he may grant,
and for what Term, 131. What Retorn he may make
for a Duplex Querela, 15. He may grant Copyhold
in Fee, 131. Vide in Church-Dilapidations, Non resi-
dence, &c.

Burying and Burying places, vide in Churches.

C.

Canons against Common Law, Customs or Prerogative,
are void, 45, 299. Which Provincial Canons are in
force, 300

Calves, Wool, Lambs, Pigs, Milk, how the Tythes thereof
are to be paid, and the Canon for the payment thereof,
251. How the Tythes of Milk and Cheese are to be
paid, 254. Sheep not kept thirty days shall pay no Tythe,
255. Cows, Calves, Lambs, &c. are to be paid,
257. To be paid where several Mens Sheep are de-
pastured together, *ibid.* How where they depasture in a
Ground whereof the Parish is not known, 258. How Wool,
Locks,

The Table.

<i>Locks, Beltings, Neckings, and the Wool of Sheep that die of the Rot is to be paid,</i>	258
<i>Cathedraicum quid, and how it became due, 163. Not the same with Synodals,</i>	285
<i>Caveats, and the use and force of them,</i>	14
<i>Chancels, by whom to be repaired, and how to compel the repair of them,</i>	170, 171
<i>Capella unde dicitur & quid, 184. The several kinds thereof, ibid. Free Chappels quid, 185. All given to the King, ibid. Who may make a Free Chappel, ibid. Parochial Chappel what, 186. How to be repaired, and by whom the Cure is to be performed, ibid. The Rector of the Mother-Church shall have the Offerings made at Chappels, 187. How it may become a Church, 188. Who shall repair Chappels annexed to Mother-Churches, ibid. Private Chappels quid, ibid. ought to be consecrated,</i>	ibid.
<i>Charges; To what Charges Parsons and Vicars, &c. are chargeable,</i>	275
<i>Churches, Unde dicuntur, 160. The several acceptations of the word in the Scripture, ibid. The manner of Founding them, 161. Who may build a Church, 162. Where a Church must be re-consecrated, ibid. The several parts whereof a Church is composed, ibid. In whom the Freehold of the Church is, ibid. Who is to repair Churches, 163. How they were anciently repaired, ibid. How the Money is to be raised for the repair of Churches, 164. In what manner a Tax is to be made, &c. ibid. How to be recovered, ibid. What is to be done if the Parishioners will not make a Levy for the repairs of the Church, 165. How to be relieved against unequal Assessments, ibid. The Landlord is not assessable towards the Repair of the Church in respect of his Rent, 166. The Person is taxed in respect of the Land he holds, ibid. The prejudice by omission of any Landholder in a Tax</i>	towards

The Table.

towards the Repair of the Church, 168. The Parson and Vicar are free from Levies towards Repair of the Church, *ibid.* And so may the Founder be by Prescription, *ibid.* Whether the Inhabitants within a Chapelry may prescribe generally to be free from Levies to the Repair of the Mother Church, 169. Churches united, by whom to be repaired, 170. Seats in the Churches, by whom built, and how to be repaired, 171. In what manner to be built, *ibid.* Who may build Seats in a Church, *ibid.* Who shall have the materials of Seats pulled up, 172. What authority the Parson has concerning Seats, and who may dispose thereof, *ibid.* Where they may be claimed by Prescription, 173. One may prescribe for a burying Place, 174. Who might anciently, and who may now be buried in the Church, *ibid.* Nothing to be paid for burying in the Church-yard, 175. But in the Church and Chancel, *ibid.* Where one of common right may be buried, *ibid.* Anciently not in Cities, *ibid.* Who may set up Tombs in a Church, 176. What remedy if broken, *ibid.* Who may not be buried in Church or Church-yard, *ibid.* Gravestones, Winding-sheets, Penants, Arms, &c. In whom the Property is, 177. In whom the Property of the Bells and other Ornaments of the Church are, *ibid.* Who shall have an Action of Trespass for the taking them away, *ibid.* How the Property of Goods may be changed by the offering of them to a Saint, *ibid.* Goods may be given to the Church, and how, 178. What Reverence is due to the Churches and Church-yards, *ibid.* Sanctuaries what, and when taken away, *ibid.* Courts, Fairs, Markets, &c. not to be kept in Church or Church-yard, 179. The Punishment for fighting or brawling in Church or Church-yard, *ibid.* The Punishment for striking or drawing a Weapon there, 180. De son assault Demesne is no plea to a Battery begun there, 181. The Punishment for making

The Table.

<i>making Arrests in the Church or Church-yard, ibid.</i>	
<i>The several Officers that were in the time of Popery, 182.</i>	
<i>Churchwardens and their Duties, ibid.</i>	
<i>By whom to be chosen, 183.</i>	
<i>Of Side-men and their Office, ibid.</i>	
<i>Sex-tons and Clerks, and their Office, ibid.</i>	
<i>How they shall be elected, ibid.</i>	
<i>The Parishioners may chuse him by Custom,</i>	184.
<i>Clergy taken away in Sacrilege,</i>	181
<i>Concubines allowed Priests, and in what manner,</i>	141.
<i>Vide Incontinence and Marriage of Priests,</i>	ibid.
<i>Confirmation of Bishops Leases in what cases necessary,</i>	117.
<i>How, where there is two Chapters, ibid.</i>	
<i>A Lease confirmed before the Sealing, 118.</i>	
<i>After the death of the Bishop, ibid.</i>	
<i>Makes several concurrent Leases, and the later is first confirmed, ibid.</i>	
<i>Grant to the King confirmed before Inrolment, 119.</i>	
<i>Who is to confirm Leases where 'tis necessary, ibid.</i>	
<i>Parsons Leases confirmed by the Bishop, who is Patron alone, 120.</i>	
<i>A Parson makes a Lease before he is inducted, which is confirmed, yet void, ibid.</i>	
<i>A Lease may be confirmed for part of the Land or Term, 121.</i>	
<i>A Parson makes a Lease which is confirmed, and after he is deprived, ibid.</i>	
<i>The Bishop and Husband of the Patroness confirms, quid operator, ibid.</i>	
<i>The Bishop and the Patron being Tenant in Tail confirms and dies, quid operator, ibid.</i>	
<i>Patron usurper confirms, ibid.</i>	
<i>Patron grants the next Avoidance, and then confirms the Lease of the Parson, ibid.</i>	
<i>A Parson leases to his Patron, which is confirmed by the Bishop, and then assigned over by the Patron, 122.</i>	
<i>The Bishop Patron confirms without the Dean and Chapter, quid operator, ibid.</i>	
<i>A Parson made a Lease before the Statute of 13 Eliz. which was confirmed after, ibid.</i>	
<i>A Prebendary leases, and recites that it is done by the Bishops consent who is a Witness to it, ibid.</i>	
<i>Lessee grants a Rent charge, which is confirmed, 132.</i>	
<i>Parson leases,</i>	the

The Table.

- the Lessee grants Annuity, and in a Writ of Annuity the Bishop and Patron are prayed in Aid, and Verdict and Judgment, quid operatur, ibid.
- Composition, vide Real Composition.
- Consecration of Churches, by whom to be done, 161. And when to be re-consecrated, 162. Vide in Churches and Chappels.
- Copyhold, if it escheat to the Parson and Lord, he may grant it in Fee, 132
- Conveyances, By what Conveyances Tythes may be past, 317
- Corn, The Tythes thereof how to be paid, 235. Of Rakings, 236. Of Green Corn cut for Beasts of the Plow or Pail, 237
- Custom, Of what force in Tything, 266, 269. Custom De non decimando where good, 268. To pay Tythes of things not tythable. ibid.

D.

- D**ifference between Custom and Prescription, 268. How far the Canonists allow of Custom, 269. Custom to pay less than the true value of Tythes, 256. Customs confirmed by Act of Parliament, 269, 270
- Deprivation and Deposition what, 97. In what Courts it may be done, 98. For Waste or Dilapidations, 100. For Simony, 98. For Non-conformity, 100. For not reading Common-Prayer within two months after Induction, 98. To maintain any Doctrine repugnant to the Thirty Nine Articles, 99. For Crimes Ecclesiastical and Civil, ibid.
- For Disobedience to the Ordinary, ibid. For taking a second Living, 100. For a Priest to marry was Cause, ibid. Deprivation ipso facto quid, ibid. For being a Common Drunkard, 99. For not using the Common-Prayer, and not administering the Sacraments according to to

The Table.

to it, 98. *Miscreants, Infidels, Hereticks, &c.* are depriv-
 able, 99. *Slaves, Villains and Illiterate Persons*, *ibid.*
 Debt upon the Statute of 2 E. 6. by and against whom it
 lies, 396. The form of the Declaration, 398. What
 Plea lies in it, 400. What Evidence is necessary for Plain-
 tiff and Defendant, 401. Verdict and Judgment is good
 therein, 404
Dignities Ecclesiastical quid, 57
Dilapidations quid, 89. A Canon against them, 89. What
 remedy against them, 90. Cause of Deprivation, 92. A
 Prohibition lies against a Bishop, and to prohibite Waste,
ibid. An Act of Parliament to avoid fraudulent Con-
 veyances made to defeat, the remedy, 93. An Action upon
 the Case lies at Common Law, *ibid.* How the Damages
 recovered may be disposed of, 95. The Trees in Church-
 yards not to be cut but in special cases, *ibid.*
Donative quid, 201. A Parish-Church may be a Donative,
 197. How it may become presentative, 198. Who may be
 Founder of a Donative, *ibid.* A Quare impedit lies of
 a Donative, *ibid.* Within what Statute it is, *ibid.*
Duplex Querela, In what Cases it lies, and what Return is
 good upon it, 15. Within what time to be sued, 16

E.

Exchequer has Jurisdiction of Tythes, 405
Excommunication ipso facto, whether without Sen-
 tence.
Exposition of Ancient Deeds, 192

F.

FArms not to be taken by Spiritual persons, but in particu-
 lar Cases, 134. A Parson may farm anothers Parso-
 nage, 135. May not keep a Tan-house or Brew-house, *ibid.*
 Feræ

The Table.

Feræ naturæ. No Tythes due for Birds or Beasts *feræ naturæ*, 260
Fees, What Fees are due by the Canon for Institution and Induction, 63. What danger a Clerk incurs that pays greater Fees than are due by Custom, 62. No Fees are due or can be due for Orders, 64, &c.
First-fruits quid, 276. Why Vicarages are higher charged than Parsonages, 280. The Antiquity of them, 76
Fish, vide *Feræ naturæ*.
Fowls Domestick, What Tythes shall be paid of them, 264
Fowling, vide *Hawking*.
Fruits, vide *Seeds*.
Forest in the Hands of a Subject, 92

G

G *Ravestones*, vide *in the Church*.

H.

H *AY*, How to be paid, 236. In Orchards, *ibid*. Grass cut in Meadows for the Beasts of the Plow and Pail, 237. Of Headlands, Balks, &c. *ibid*.
Herbage, The Canon for it, 247. Who shall pay it, *ibid*. Not for Saddle Horses, 248. Not for Beasts of the Plow or Pail, *ibid*. Nor for Beasts *Feræ naturæ*, *ibid*. What shall be done where a Ground is eaten with mixt Cattel, 249. For what Cattel *Herbage* is due, 250
Honey, vide *Bees*.
Hunting, Hawking, Fishing and Fowling, what Tythe is due thereof, 263

Incont

The Table.

I.

Incontinence, *How punishable in the Clergy, 142, &c.*
Vide Concubines.

Indicavit lay at the Common Law, and in what Cases, 391.

For a Sixth part. 392. In what Cases it lies at this day,

393. Not till after Libel, ibid. The form of the Writ not

altered, ibid. It lies of Offerings, ibid. By whom, 397.

The manner of Proceeding in it, ibid. When the matter

shall be remitted to the Spiritual Court, 394. The form

of the Writ, ibid. This Writ lies of a Vicarage, Parsonage,

Prebend, &c. ibid. Who shall have it, ibid.

Induction, How to be made, 7. Who may make it, ibid.

What is to be done after it, 8

Institution in what manner to be made, 7. It may be done

out of the Diocess, ibid. The vertue of it, 7, 8.

Ipsa facto in Statutes how expounded, 101

Jure Patronatus, In what Cases it is necessary, 12. Whe-

ther the Bishop be bound to sue at his own peril, ibid. It

may be sued though the Church be not litigious, ibid. The

manner of proceeding therein, 16. The Points inquirable in

it, 17. How the Verdict is to be taken in it, 18. Quid

operatur by the Verdict, ibid. If the Jury refuse to give

their Verdict, quid fieri, ibid. Who may hold it, 19. The

Bishop himself may, ibid. If the Commissioners neglect

their Duties, quid fieri, ibid. The Verdict in it is not ob-

ligatory, ibid. At whose Costs it is to be sued, 12

Jurisdiction, vide Recovery. The Spiritual Court hath Ju-

risdiction in Simony, 61. In matters of Deprivation, De-

positions and Resignations, 97. For Mortuaries, 347. Con-

firmed by several Acts of Parliament as to Tythes, 371.

Where the Temporal Courts have Jurisdiction of Tythes,

369. And where the Spiritual, ibid. Where Tythes were

anciently determinable, 352

King,

The Table.

K.

King, If a Simonist dies possess'd, the King shall not lose the Presentation, 58. The King may present upon a Simoniackal Contract, though he cannot be guilty of it, 60

L.

LAmbs, vide Calves.

Lapse incurred to the Bishop, and the Patron presents, 9. If the Bishop may let a litigious Church lapse, 12. Where by the taking of a second Benefice, 23. From what time the six Months shall commence, 8. And how to be accounted, 9

Leases, What Leases may be made by Clergy-men, 103. At Common Law, 104. By the Statute of 32 H. 8. *ibid.* What quality such Leases must have, 105. They must be in Writing indented, 106. Must commence from the making, *ibid.* The old Lease must expire within a year, *ibid.* There must not be a double Lease, *ibid.* What things may be Leased, *ibid.* Not an Advowson, 107. It must be of Lands usually let, *ibid.* The usual Rent must be reserved, *ibid.* Must not be without Impeachment of Waste, 108. Parsons and Vicars are excepted in the Statute of 32 H. 8. *ibid.* Bishops are restrained by 1 Eliz. 109. Where such Leases shall only be voidable, 110. The 1st of Eliz. is a private Act, *ibid.* Concurrent Leases by Bishops where good, 111. By others and when they may be made, 112. Who is to confirm them, vide Confirmation. They cannot be for Lives, nor upon a Life, 119. In what Cases Deans, Prebends, &c. are restrained by 13 Eliz. 111. Parsons and Vicars are restrained by it, 112. Where upon a concurrent Lease the former must determined within three years, *ibid.* But not so for Bishops, 113. Where a Parson

The Table.

Parsons Lease shall be void by Non-residence, 114. Whether it shall be void against himself, 125. Houses in Corporations how to be leased, 115. Not in Reversion, *ibid.* What Leases by Bishops and Archbishops are good, 104. By Deans, Prebends and Colleges, in what cases they are good, 105. From what time to commence, 106. Parson Leases and Resigns, 125. Parson Leases, the Lease is confirmed, and then he becomes Non-resident, 124. Bonds and Covenants for future Leases, in what cases they are void, 127. And Promises, *ibid.* In what manner Colleges and Hospitals may lease, 128. Where a Lease shall be good though a former be in being, 111. The former Lease surrendered between Sealing of the new Lease and Livery of Seisin, *ibid.* Lands usually set together divided into several Leases and Rents apportioned, 107. Relief for Leases made Simoniacally,

64

Litigious, Where a Church shall be said to be Litigious, 11. How many ways a Church may become Litigious, 12. Where it may become Litigious by a Jure Patronatus, *ibid.* Where after a Jure Patronatus, *ibid.* The Bishop may admit either Clerk without a Jure Patronatus at his peril, 16. Vide Jure Patronatus and Lapse.

London, How Tythes are to be paid there, 350. How anciently, *ibid.* The Decree abridged, 351, &c. Cases put upon the Decree, 255. How the Tythes of the new erected Churches shall be collected, levied and paid,

357

The Table.

M.

M *Arriages of Priests forbid by several Canons, 137. Prosecuted by whom, and how, 138. John de Cre-*
ma that prosecuted this matter taken in Bed with a
Wench, ibid. How forbid by the Apostles Canons, 137.
Made Felony to use their own Wives, or to keep them
Company, 143. After this was mitigated, ibid. To af-
firm a Priest might marry made Heresy and Treason, 144.
All Law against their Marriage repealed, and their
Children legitimated, ibid. That Act repealed, and at
last revived, ibid.

Mast, vide Seed.

Milk, vide Calves.

Mills, Whether any Tythes are due from them, and of
what kind, 261

Modus decimandi, vide Prescription.

Monastery Lands, In what cases free'd from Tythes, 326.
How many ways they may be discharged, 331, &c. What
Orders were free'd from the payment of Tythes, 327. In
what case the lesser Abbies may be free, 331. Not of Lands
purchased after, 1215. 333. By Real Composition, 323.
By Bulls, 327. By perpetual Unity, 334. What shall be
said a perpetual Unity, and the Qualities of it, ibid.
Whether Lands that came to the Crown after 31 H.8.
can be free'd, 336

Mortuaries quid, and where due, 346. They are only by
Custom, 348. Mortuaries by Bishops to the King quid,
349. Their several Appellations, ibid. In Chester of
a Priest, ibid. The Statute for the payment of them, 347.
Provincial Canon for them, 346

Monie. Les Value since discovery of West Indies, 302

The Table.

N.

NE admittas, *In what Cases it lies,* 14
Notice of Resignation, &c. where requisite, and how
to be given, 10

O.

Ordinary, *vide Bishop.*
Ornaments of the Church, vide Church.

P.

Parliament of England restrained the Pope's Power, 24
Pardon of Simony the effect of it, 59
Parson, Who may be so, 1, &c. He must be a Priest in Epis-
copal Orders, 67. He must subscribe before the Bishop
the Ingagement, and have a Certificate of it, ibid.
He must read the 39 Articles, and how, 68. He must
declare his assent thereunto, and in what manner, ibid.
The danger if he fail in any Circumstances, 69. Those
things must be repeated upon taking a new Living, ibid.
Good advice to them, 70. Of what Age a Parson must
be, 67, 72. Who may be Parson of a Living of 30 l.
per annum in the King's Books, 72. He must be con-
formable, ibid. When and how oft he must use the
Common Prayer, 73. Before every Lecture, ibid. The
penalty for using other Forms, 74. He must not main-
tain any Doctrine against the 39 Articles, 75. What
he must do before and after Institution and Induction,
 73
Parsonage or Rectory, what, 190. Whereof it consists,
ibid.

Pentecostals, Quid & ubi dedit.

F f 2

393
 * Permu-

The Table.

Permutation quid, 202. The form of a Conditional Resignation upon a Permutation, ibid. The Protestation, 203
If either Incumbent upon a Permutation be put out he may repair to his own Living again, 204
Personal Tythes quid, and in what places due, 338
Page, vide Calves.

Pluralities quid, 20. Canons against them, 21. The mischiefs that attend them, ibid. The acceptance of a second Living makes the first void, 23. As to the Patron without Sentence declaratory, ibid. But not to lapse without notice, 23, 24. The Act of Parliament against Pluralities, 25. Which shall be said a Living of 8l. per ann. ibid. That a Parson not qualified may have a Plurality, 27. Who is qualified by service to have a Plurality, ibid. And who by Birth, 28. And who by Dignity, 29. He that takes a Plurality must have a Testimonial, ibid. How to proceed in the taking a Plurality, 30. The first is void by Institution into the second, ibid. Which Chaplains are qualified, where there is above the number allowed by the Statute retained, 31, 33. The Master dies before the Chaplain is preferred, 32. The Mistress marries and becomes a Widow again, ibid. Or marries under her Degree, 32. What Livings and Preferments made a Plurality, 33. No body can have a double capacity to qualify, ibid. Chaplains retained by the Son in the Father's life time are not qualified, 33. Master discharges his Chaplain before he is preferred, ibid. One qualified is instituted into the second before a Dispensation, 34. The King cannot dispense with this Law, ibid. Inducted into a second Living, and does not read the Articles, ibid. A Clerk qualified is made a Bishop, his qualification ceases, 35. Where Union shall make a Plurality, ibid. A Vicar made Parson of the same Church, or è conversò, ibid. Of another Rectory in the same Church, 36. The ill effects of taking Dispensations from the Pope, and giving it

The Table.

it to the Nobility, 37. How many Qualifications there are in England, *ibid.* In Margin, of what Livings Pluralities were originally allowed, *ibid.* In what Cases the Canonists allow of Pluralities, 21. None may have two Preferments in one Church, 22. Reasons why the Nobility should waive this Privilege of qualifying for Pluralities,

37

Pope, Several Acts of Parliament to restrain his usurpations, 24. Charged with a damnable Custom in the Court of Rome to use extortion, *ib.* Charged with the like by a Council, *ib.*

Priests, Who may be, and at what Age,

67

Prescription and Modus decimandi quid, and why the Ecclesiastical Courts reject Custom and Prescriptions to the damage of the Church, 299. How Prescription and Custom differ, 300. Confirmed by Parliament, 304. Prescription De modo decimandi, *ibid.* Justified by Reason, 300. Who may prescribe in Non decimando, 304. And who in Modo decimandi, *ibid.* A Modus to do two things, and one fails, 307. For Houses where good, 308. What Prescriptions are good, *ibid.* &c. For Wool and Lamb where good, 309. For Corn, *ibid.* For Wood, 310. For Calves and Milk, *ibid.* For Eggs, 311. For land in lieu of Tythes, *ibid.* For Headland and Balks, *ibid.* For Bees, 312. For Herbage, *ibid.* For Fewel, 313. For Parks, *ibid.* To pay the Vicar for Tythes due to the Parson, 314. How a Modus decimandi may be destroyed, 316. From what time Prescriptions shall commence, 328. How Prescriptions shall be proved, à posteriore, and practice since,

225

Presentation, The form thereof, 5. How to be proceeded on, 6. What time the Patron has to present, 10. Where his Clerk is refused for just Causes,

8

Privilege of the Clergy, they may not be compelled to serve in Temporal Offices, 145, 149. Are not bound to appear at the Sheriffs Turn, 148. They are not to be arrested in some Cases, 147, 150. Not to be disturbed whilst doing Divine

F t 3

Service,

The Table.

Service, 145. Not to pay Toll, 147. Nor Pontage, Murage, &c. ibid. May sue in the Ecclesiastical Court for Batteries on their persons, 156. The Collector of Tenths may not disturb them, 149. Their privilege in Criminal cases, ibid. Free'd from Purveyance, 150. Not to be amerced for their Church Livings, ibid. No Execution may be served on the Goods of the Church, ibid. Their Privileges confirmed by several Acts of Parliament, 152. What Privileges they pretend by the Canon and Civil Law, ibid. &c. And what Privilege they have in ground where the Tythes grow, 271
Procurations quid, where due and how, 282. Not to the Arch-deacon when the Bishop visits, 283, 285, &c. How many Servants are allowed the Visitors, 289
Prohibitions, Sur modus decimandi, 380. For freeing Monastery Lands, ibid. Where the Suit is for the Tythe of things not tythable, 382. For matter triable at Law, 383. Because the Spiritual Courts proceed against Law and Reason, ibid. Must present a Copy of the Libel, 384. In what Cases the Suggestion must be drawn up, 382. In what Cases a Prohibition is peremptory, 385. How to be prosecuted, 381. Where it lies after a Consultation, 388. Where a special Consultation shall be granted, ibid. In what Cases the Suggestion is to be proved within six Months, 384. How the six Months must be accounted, 389. The benefits and damages Prohibitions introduce, 390. How to prosecute and defend Prohibitions, 386. In what Cases it is grantable after Sentence, ibid.
Property, Where the property of a Man's Goods shall be taken away by the offering them to a Saint by a Stranger. 177. And in what Cases he may take such Goods again, ibid.

Q.

Quare Incumbravit, Where it lies,

The Table.

R.

R *Real Composition* quid, and the effects thereof, 323, &c.

Recovery, In what Courts Tythes were anciently to be recovered, 368. In what Cases the Spiritual Court hath Jurisdiction concerning Tythes, 369. And in what Cases the Temporal Court hath Jurisdiction, 381. Where the Spiritual Court hath not Jurisdiction, 371. The Spiritual Jurisdiction confirmed by the several Acts of Parliament, *ibid.*, &c. The remedy where the Spiritual Courts are not, obeyed before Sentence, 376. The remedy for disobedience after Sentence, *ibid.* 2 E. 6. extends only to Predial Tythes, 379. Observations on the Statute of 27 H. 8. 376. And on the Statute of 32 H. 8. 377. Upon all the Statutes, *ibid.* Vide *Exchequer*, and in *Jurisdiction*, *antea*.

Residence is *Jure divino*, 75. Non-residence was not heard in the Western Church of 700 years after Christ, *ibid.* An Act of Parliament against Non-residents, 77. The end of that Law, 79. Who may by that Law be Non-resident, 81. A Pluralists Masters dies, he may not be Non-resident, *ibid.* How Bishops may be compelled to Residence, 82. Where a Parsons Lease shall be avoided by it, 144. In what Cases he may demise and be Non-resident, 114, 115. The penalty for Non-residence, and how to be recovered, 77. Complained of in Parliament, 76. The damage the Church suffers by the Non-residents, *ibid.* &c. The King may seize of the Temporalities of a Bishop for Non-residence, 82. The form of the Writ of Seizure, *ibid.* The Epistle of Pope Damasus against Bishops Non-residence, 85

Resignation, To whom to be made, 200. It may be to the King, *ibid.* The several words of a Resignation, 201. It may be to a publick Notary, or in his presence, or by Proxy, *ibid.* It may be upon Condition, *ibid.* The form of it upon a Permutation. 202

The Table.

S.

S <i>Eats in Churches, vide Churches.</i>	
<i>Scire fac. In what Cases the right of Tythes was determinable in them, and how taken away,</i>	394
<i>Seeds, Fruit, Mast, Bees, How to be tythed,</i>	259, &c.
<i>Simony quid, 39. Canons against it, 40. The little effect of those Canons, and the reason, ibid. The difference the Canonists make between Simoniacus and Simoniac, 41. An Act of Parliament against it, 42. The penalty upon the corrupt Patron, ibid. Where he shall lose his Presentation, 42. The Clerk not privy, where he shall be disabled, 46. What Contracts shall amount to Simony, 50, 56. Bonds for Resignation shall not, 51. Examinable in the Spiritual Court, 61. Advice against Bonds for Resignation, 54. Who may take advantage of it, 58. In giving above the due Fees for Institution, 60. For Resignation upon Exchange, ibid. For corrupt giving Orders or License to preach, 61. A Canon against this, and what Fees are to be taken, 62. How the penalties are to be recovered, 62. The effect of a Pardon of Simony, 59. What Contracts are not Simoniacal, 56. Who are within the Law against Simony, 57. Not where the Contract is not executed, 58. If a Simonist die in possession, the King shall not lose his Presentments, ibid. There may be Simony and the Patron and Clerk both free, 59. The Ecclesiastical Courts have the power to examine it, saved in the Statute,</i>	61
<i>Synodals, Quid & ubi, & cui debet,</i>	283, &c.
<i>Spoliation, Quid & ubi,</i>	267, 268
<i>Statutes, Interpretation.</i>	382

The Table.

T.

TEnths quid, ubi & cui debet, 280. *What remedy the Successor has for the Arrears in the time of his Predecessors,* 282
 Tythes, Quid & quotuplex, 214. Majores, quid, 215. Minores quid, ibid. Quo jure due, 216. To whom due, 218. The Parochial Right when it commenced, 219. Who is capable of them in permancy, 224. Due to the Rector prima facie, 225. Extraparochial, to whom due, 226. A Parson, &c. may have a Portion in another Parish, ibid. To whom due in particular Cases, 226. To whom due in the Vacation, 227. If Parsons and Vicars shall pay each to the other, 228. Tythes may belong to a Chappel, ibid. Of what things due, 235. Of what not, 264. What privilege the Parson has in the Lands where they arise, 271

V.

Vicarages, Of their Endowments before and within memory, 191. How to be expounded, 192. Indowed de Alteragio expounded to extend to small Tythes, ibid. De minutis decimis, and expounded to Wood, ibid. Corn-Lands sowed with Wood, Saffron, &c. ibid. The Vicar shall not have Tythes of the Glebe of the Parson, nec è converso, 193. How the Indowment of Vicarages was introduced, 194. How they may be reunited to the Parsonages, 195. In what Cases they ought to be enlarged out of the Parsonage, 196. The Parson shall free the Vicar from Incumbrances, 197. How they may be dissolved and re-united, 195, 196
 Visitations, and matters concerning them, 293
 Voidance, vide Simony, Pluralities, &c.
 Usurpation, A Caution to avoid it, 13
 Winding-

The Table.

W.

Winding-Sheets, vide in Church.

Wood; A Canon for the payment of Tythe-Wood, 240. Complaints against it in Parliament, *ibid.* Limitation by the Statute, *ibid.* Which was a Declaration of the Common Law, *ibid.* Questioned if an Act, and vindicated, *ibid.* Sylva cædua quid, 242. What shall be said great Wood, *ibid.* Of what Wood Tythes shall be paid, *ibid.* Of Nurseries, 243. Of Toppings, 244. Of Bark, *ibid.* Not of Dotards, *ibid.* Where due if great and small Woods be mixt, 245. Who shall pay it, the Buyer or Seller, *ibid.* Prescription in non decimando, where it is good, 246. How to be paid, *ibid.* Where due of Wood that is grub'd, *ibid.*

Writs Mandatory for the payment thereof.

Wool and Lambs, How the Tythe thereof is to be paid, 252. Where Sheep shift Pasture from one Parish to another, 257. There shall be no Tythes paid in those Parishes where they are kept less than 30 days, 255. Vide plus in Calves before.

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